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Part II
July - December

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LEGAL OPINIONS OF THE OFFICE OF GENERAL COUNSEL

1979

PART II

JULY - DECEMBER

JANE MCGREW
GENERAL COUNSEL

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URBAN DEVELOPMENT

Donald G. Dodge, Director
Office of Policy Planning, CP

AUG 10 1979

GUB

Robert S. Kenison, Urban Development Division, GU

Section 107(a)(5), Secretary's Discretionary Fund - Eligibility of Relocation Projects

On July 16, 1979, this office responded to an inquiry raised by Ellen Levy of your staff as to whether a recipient of a discretionary block grant for disaster relief (pursuant to section 107(a)(5) of the Housing and Community Development Act of 1974, as amended) could be required to expend a portion of its funding on projects designed to prevent future disasters. We advised that the legislative intent appeared directed to situations requiring the immediate relief of emergency conditions.

Since our initial response, you and members of your staff have met with Mrs. Sauerbrunn and Messrs. Hirsch and Polatsek to explore the eligibility of a relocation project designed to move residents from the area of a flood plain which had been subjected to repeated Presidentially-declared disasters.

Neither the statute nor the committee reports provide express guidance on the subject. Our understanding of the House Subcommittee markup sessions is that the fund was regarded as a source from which to meet unanticipated emergency needs caused by disasters for which other title I funds were unavailable or inadequate, and that routine community development activities would be precluded.

The purpose of the grant is to alleviate the consequences of disasters which have occurred, and this is clearly reflected in the regulation in § 570.407. At the same time, we do not regard the undertaking of reasonable incidental activities directed at reducing or controlling the threat of a probable recurrence of such disasters to be statutorily prohibited. We would in fact interpret the reference to flood or drainage facilities under the eligible activities provisions of paragraph (d) of § 570.407 to reflect such authority. In addition, it should be noted that such considerations were clearly a part of urban renewal disaster project policies (Urban Renewal Handbook RHA 7225.1, Chapter 1, Section 3).

In view of the purpose of section 107(a)(5) to establish a special set aside fund to meet immediate emergency needs caused by disasters, we believe the incidental nature of activities which may be undertaken as preventive measures in anticipation of a recurrence is not to be disregarded. Such measures will generally be more properly within the realm of objectives for which other title I funding sources are provided.

The proposed relocation appears to fall into this category of incidental activities and should be considered in light of such constraints. In addition, we would recommend that the regulations be modified to clarify the eligibility of this type of activities. Subject to appropriate limitations, we are further of the opinion that administrative requirements mandating certain preventive measures in connection with probable recurrences as a condition of these grants are legally permissible.

Robert S. Kenison

Associate General Counsel

Donald G. Dodge, Acting Director
Office of Policy Planning, CP

AUG 23 1979

GUB

Robert S. Kenison, Urban Development Division, GU

Displacement /Relocation Competition of the Innovative Grants Program (F.R. Notice - January 19, 1979)

You have requested a legal opinion concerning the eligibility of several applications for further consideration in the captioned competition. You have provided us with the application of the Town of Brookline, which is representative of the group of applications about which you have some concern.

The Town of Brookline application contemplates that innovative funds would provide equity assistance to low- and moderate-income persons to purchase condominium units. At the time of purchase, a second lien in favor of the Town will be placed on the unit in the amount of the equity assistance. The second lien will be repayable when the unit is sold. In the case of default, first priority shall go to the repayment of the first lien and then to the Town's lien. The equity assistance, when recovered upon sale or default, will be used to assist additional low and moderate income households. It is clear in the application that the Town of Brookline itself will be carrying out the program directly.

You have noted that the program as proposed by Brookline is an ineligible activity. You have noted further that the activity would be eligible if structured to meet the requirements of § 570.204(c).

The Federal Register notice announcing the competition (44 F.R. 4124) provides that proposed activities must meet the eligibility requirements of 24 CFR Part 570, Subpart C. You are asking whether an application, such as that of Brookline, that lists an activity which, if structured differently, would be eligible, may be considered eligible for consideration in the competition on the premise that the applicant will be requested to restructure the activity to conform with the requirements of § 570.204(c) prior to funding.

In our opinion the Brookline application should not be considered in the competition because it does not meet one of the threshold requirements of the competition, namely, the submission of an eligible activity. The notice of competition is clear that the proposed activities must be eligible pursuant to 24 CFR Part 570, Subpart C (§§ 570.200 - 570.207). The proposed activity does not fall within the purview of any of the activities listed as eligible for grantees in Subpart C. Furthermore, § 570.207, which sets forth an illustrative listing of ineligible activities, includes the following example:

> "(g) Income payments. The general rule is that assistance shall not be used for income payments for housing or any other purpose. Examples of ineligible income payments include the following: payments for income maintenance, housing allowances, down payments and mortgage subsidies."

Although we understand that the equity assistance is not to be paid directly to the purchasers under the Brookline proposal, we consider it clearly an income payment for housing under this paragraph.

As you are aware, § 570.204(c)(4) authorizes certain nonprofit and other entities to undertake activities not otherwise eligible under Subpart C which are "appropriate for community economic development or neighborhood revitalization." The Brookline proposal might be made eligible under this authority, if carried out through such a qualified entity. It has been suggested that either the proposal could be revised, or the grant conditionally approved subject to a revision, pursuant to the requirements of § 570.204(c)(4).

We have consistently taken the position that in any competitive grant process, all applicants must be ranked fairly under the same standards. Although the Brookline application may be regarded as highly meritorious in other respects, it fails to meet one of the published criteria for qualification. To permit the activity to be revised after the application filing deadline would provide Brookline with an opportunity not made available to other applicants who might be accepted or receive a more favorable ranking by modifying their activities.

Such a practice in effect would reopen the competition with the potential for displacing those competitors who have now been ranked high enough to be funded. While there may be instances in which application defects of a technical nature can be cured subsequent to a filing deadline, this is not such a case.

Attached is the Brookline application that you had requested us to review.

(signed) Vincent R. Landau
for Associate General Counsel

Robert C. Embry, Jr., Assistant Secretary
for Community Planning
and Development, C

OCT 4 1979

GUB

Robert S. Kenison, Urban Development Division, GU

Block Grants - Eligible Activities - Acquisition of Partially Completed Residential Structure for Low- and Moderate-Income Persons

The proposed memorandum to the Area Manager, Honolulu, indicates CPD's concurrence in a proposal by the City and County of Honolulu to employ community development block grant funds to purchase an eight-story 63 unit building for resale as condominiums to low- and moderate-income persons. The applicant cites the extremely tight housing market in the City and the very high cost of sales housing within the jurisdiction as its reasons for seeking to provide housing units in this manner. The memorandum is returned without concurrence.

We are informed that due to financial difficulties, construction of the building by the original developer terminated sometime ago, when the structure was about 60 percent completed, and that no further work has been done since. As a means to enable a new developer to procure the necessary interim private financing, the City wishes to immediately draw down $2,050,000 in block grant funding and to escrow it under a commitment to purchase the completed structure for that amount. It is contended that such an undertaking is an eligible activity under § 570.201(a)(5), since it involves the acquisition of real property to be used for "other public purposes."

It is our view that the proposed activity constitutes assistance for new housing construction, prohibited by § 570.207(f) except for "last-resort housing" or as permitted through certain eligible entities, such as local development corporations or neighborhood nonprofits under the provisions of § 570.204(c)(4). The prohibition stems from the legislative intent not to permit the use of title I for the construction of new housing, as evidenced in the following floor debate on the original legislation, which appeared in the Congressional Record of June 24, 1974, pages H 5370-5371:

> "Mr. Badillo: Under title I, is it true that there is no provision to build any new housing . . .?
>
> "Mr. Moorhead: . . . starting from the ground up? . . . Not for rehabilitation?

"Mr. Badillo: No, for new housing.

"Mr. Moorehead: . . . there is money in title I to prepare sites for new housing, to get the sites ready to put the bricks and mortar up.

"For new housing, we have to turn to title II . . . ."

This understanding is also expressed in the Conference Report to the 1974 legislation, which observed that Davis-Bacon requirements were delineated only in the context of the rehabilitation of residential property "since construction of residential structures is not a permissible use of community development funds."

Furthermore, there is abundant legislative history that the Housing and Community Development Act of 1974 was intended to make eligible only those activities which were eligible under categorical programs which it consolidated (with certain exceptions not relevant here), plus certain additional new activities expressly listed. The construction of new housing was not an eligible activity under the categorical programs and it is not expressly listed as a "new" activity in the Act of 1974. Although the acquisition of real property for "other public purposes," authorized by section 105(a)(1)(E) of the Act and implemented by § 570.201(a)(5), is specifically mentioned in the House Report as one of these "new" activities, there is no basis for construing the provision to authorize approval of the subject proposal in the face of the legislative history against new housing construction under title I.

Where the housing construction is secured by the grantee's prior commitment to acquire the improved real property on completion, as in this case, the effect in regard to the provision of newly constructed housing is the same as if the City procured the construction through the developer directly, and is thus impermissible under the general rule of § 570.207(f), described above. On the other hand, we would agree that the purchase of new residential properties which are constructed and offered for sale on the general market without pre-arranged block grant funding obligations, is eligible under § 570.201(a)(5) where a public purpose is served. Such a public purpose could be the provision of housing accessible to low- and moderate-income persons, where the supply of such housing is insufficient to enable a city to meet the goals established in the Housing Assistance Plan which accompanies its application for block grant assistance.

In view of the foregoing, the grantee should consider undertaking this activity through the use of an appropriate subrecipient under the provisions of § 570.204(c)(4). As you know, that section implements section 105(a)(15) of the Act, added in 1977, which authorizes grants to certain neighborhood-oriented entities for neighborhood revitalization or community economic development furthering the broad statutory objectives of section 101(c). Subject to the provisions of § 570.204(c)(4), the construction of new residential housing can be an eligible activity under that authority.

Robert S. Kenison

Associate General Counsel

Attachment

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: October 5, 1979

IN REPLY REFER TO: 8G

TO : Robert J. Matuschek, Director
Office of Regional Community
Planning and Development,
8C
Attention: Mary Sutton, 8CO

FROM : Jack B. Toll, Office of Regional Counsel, 8G

SUBJECT: Interpretation of 24 CFR 570.207(f),
Permissible Activities in Support of Housing

This is in response to your memorandum dated September 26, 1979 on the above-referenced subject. The city of Sioux Falls has requested a determination on whether certain activities proposed by them are eligible under 24 CFR 570.207(f).

Your first question deals with writing down the cost of property for a private developer of low income housing. Writing down the cost of property for a developer is only possible if the city owns the land and sells that land for less than it's fair market value, in which case we would require that this sale be pursuant to a written policy of the city regarding circumstances in which they permit sales at less than fair market value and also that an anti-speculation provision be inserted in the deed conveying the property. A cash payment, as proposed by Mr. Mike Crane of the Sioux Falls CD staff would, as you pointed out to them, be an ineligible income payment per 24 CFR 570.207(g).

With respect to Items b, c, and d, i.e., clearance of structures, public improvements and amenities such as additional trees and expanded play areas, the key issue is not whether these activities take place on public property but whether they are to be considered pre-construction, and thus eligible under 570.206(g), or activities constituting new construction ineligible under 570.207(f). The last paragraph of 570.207(f) which states that clearance, site assemblage, provision of site improvements and provision of public improvements are not to be considered "programs to subsidize or finance new residential construction" is to be read in light of 570.206(g) which permits certain preconstruction costs. On this basis, I would find certain of the activities proposed eligible.

PREVIOUS EDITION IS OBSOLETE

Clearing exisfting structures from the proposed site is an eligible activity under 570.201(d) regardless of whether the property being cleared is publicly or privately owned. Public improvements are eligible under 570.207(f) providing the improvements are such things as bringing water and sewer lines to the site; things of this nature would again be eligible regardless of the ownership of the site.

Additional trees and landscaping would be permissible site improvements under 570.207(f) again regardless of the nature of siteownership. However, play areas for children are part of the construction cost and would not be permissible under 570.207(f). Play areas on publicly owned property would be considered recreation; on privately owned property they are construction and will not be permitted with CDBG funds.

The final request to use CDBG funds for "measures designed to improve energy efficiency" might be eligible rehabilitation costs once the building is constructed. They are clearly not site improvements per 570.207(f). Since the projects have not yet been constructed, I would consider such measures new construction and ineligible use of CDBG funds.

If you have any further questions regarding the issue please feel free to contact Myndie Brown at 4148.

Regional Counsel

NOV 5 1979

Joseph B. McSweeny, Area Counsel, 3.1G
Baltimore Area Office

GUB

Robert S. Kenison, Urban Development Division, GU

Block Grants - Urban Counties - Proposed Enabling Legislation
for Baltimore County

This will respond to your memorandum of September 17, 1979, requesting our review of a proposed amendment to the Baltimore County Code. The draft legislation is intended to permit Baltimore County to qualify as an urban county eligible for block grant assistance pursuant to the Housing and Community Development Act of 1974, as amended. An urban county eligible to receive this assistance is defined in section 102(a)(6) of the statute as, among other things, a county which is "authorized under State law to undertake essential community development and housing assistance activities in its unincorporated areas . . . ."

In 1974, the Baltimore County Solicitor believed that the County possessed this authority. After reviewing his position, this office wrote to the Chief County Solicitor on March 7, 1975, indicating that although the County possessed the general authority to take property through eminent domain, the Maryland courts had prohibited the taking of real property for private, as opposed to public, use. In a letter to Representative Clarence Long dated July 12, 1976 (a copy of which is attached for your convenience), we stated that it was an essential feature of the urban renewal program that State agencies be able to dispose of land to private developers for appropriate redevelopment. Since Baltimore County was not legally empowered to do this and since urban renewal is an "essential community development activity," as this term is used in the definition of the powers of an eligible urban county, we concluded that without additional legislation Baltimore County could not qualify as an eligible urban county. An enabling act permitting Baltimore County to carry out urban renewal, including the power to dispose of property to private developers, was passed in 1961 but was repealed in 1965.

Article 2 of the proposed statute indicates that property acquired in connection with "community development projects" may be disposed of for redevelopment to "any private, public or quasi-public corporation, partnership, association, person or other legal entity." We believe that this language will cure the defect as regards Baltimore County and will enable it to become eligible to receive assistance under title I of the Housing and Community Development Act of 1974, as amended.

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In addition to the foregoing, we wish to invite your attention to the following general comments:

1. The definition of "community development project" appearing at section 1, paragraph 1(e) defines "community development project" in terms of urban renewal powers and attributes. While such a designation is adequate to qualify Baltimore County as an urban county, it could become troublesome if the proposed statute were considered to be an exclusive authority with the effect of precluding other, nonurban renewal community development activities eligible for assistance under section 105(a) of the block grant legislation. In your telephone conversation with Mr. Polatsek of my staff on October 10, 1979, we conveyed our opinion that this restrictive definition, as well as the possible elimination of the present definitions of "slum area" and "blighted area" in favor of a more narrowly described "community development area" might unnecessarily limit Baltimore County's grant of authority.

2. The language appearing under the section on powers at section 2(5) is slightly confusing, because the County is authorized to include in its federally assisted grant contracts such conditions imposed under Federal law as the County may determine reasonable and appropriate. Obviously, the County must comply with block grant regulations and policies in order to receive an entitlement grant. This section should be clarified so as to eliminate any implication that Federal requirements are subordinate to County preference.

3. The use of the term "sub-heading" in the first sentence of section 6(a) is somewhat confusing and might be clarified.

4. Finally, we are curious as to whether the requirement in section 6(b) that the County dispose of real property to private persons only through competitive bidding

3

procedures is a standard requirement for all property disposition by the County. If not, there is some question as to whether this requirement should be imposed upon community development projects.

Robert S. Kenison

Associate General Counsel

Attachment

JUL 12 1976

Honorable Clarence D. Long
Member, United States
House of Representatives
200 Post Office Building
Towson, Maryland 21204

Dear Mr. Long:

Secretary Hills has requested me to reply directly to your letter of June 24, 1976, in which you enclose correspondence from the Baltimore County Executive relating to a question of whether Baltimore County qualifies as an "urban county" eligible for an entitlement grant under title I of the Housing and Community Development Act of 1974. It is the position of the Baltimore County Executive that the county possesses the legal authority to carry out many of the activities which the 1974 legislation requires of urban counties. He bases his opinion on an enclosed Memorandum of Law, prepared in 1974 by the County Solicitor. On March 7, 1975, this office wrote to the Chief Assistant County Solicitor, after having reviewed the legal position taken in that Memorandum of Law. It was then our opinion that Baltimore County does not legally qualify for entitlement as an urban county. This remains our position.

While Baltimore County possesses the general authority to take property through eminent domain, this provision has been interpreted by the Maryland courts to prohibit the taking of real property by the State or its delegate for private as opposed to public use. See: Riden v. Philadelphia, B. & W. R. Co., 35 A 2d 99 (Ct. of App., Md. 1943). The fact that private developers may dispose of property acquired through eminent domain in a fashion which benefits the public as a whole is not sufficient in the view of the Maryland Court of Appeals to permit the conveyance of land acquired by eminent domain to such private entities.

It is, of course, an essential feature of urban renewal as previously undertaken pursuant to title I of the Housing Act of 1949, as amended, for the acquiring State agency to dispose of land to private developers for redevelopment consistent with the objectives of an applicant urban renewal plan. Urban renewal is an "essential community development activity" as this term is used in defining the powers possessed by an eligible urban county in section 102(a)(6) of the Housing and Community Development Act of 1974. Absent the power to dispose of an acquired property for private redevelopment, it is our judgment that Baltimore County lacks the power to carry on an essential community development activity.

In its Memorandum of Law, the County Solicitor's Office speaks in terms of Article 44(A) of the Code of Maryland. This statute provides for the creation of housing authorities, and allows for broad powers of eminent domain and reuse of land in favor of counties in Maryland. These powers, however, are clearly circumscribed and are limited to the case in which decent, safe, and sanitary housing is being provided to persons of lower income. Without additional legal authority, it appears that Article 44(A) provides no basis for the construction of urban renewal projects (including the sale or lease of property acquired through eminent domain) to private developers. We note that in 1960 the Maryland Constitution was amended to give the General Assembly power to enable counties to carry out urban renewal. An enabling act permitting Baltimore County to do this was passed in 1961, but was repealed in 1965. Other Maryland counties continue to possess urban renewal authority.

It remains our opinion that specific legislation is required in order for a county to acquire private land for private reuse. Baltimore County lacks such power in the absence of specific legislation, and therefore cannot qualify for entitlement as an urban county pursuant to the Housing and Community Development Act of 1974. See: Master Royalties Corporation v. Baltimore, 200 A. 2d 652 (Ct. of App., Md. 1964).

Sincerely,

/s/ Robert R. Elliott

Robert R. Elliott

17 AUG 1979

Marshall Kaplan, Deputy Assistant Secretary
for Urban Policy, CU

GUB

Robert S. Kenison, Urban Development Division, GU

Use of Section 107(a)(8) Technical Assistance Funds

This is in reply to your memorandum of August 13, 1979, concerning the funding of evaluation studies with section 107(a)(8) technical assistance funds.

Section 107(a)(8) provides that the Secretary may make grants:

> "(8) to States, units of general local government, Indian tribes, or areawide planning organizations for the purpose of providing technical assistance in planning, developing, and administering assistance under this title. The Secretary may also provide, directly or through contracts, technical assistance under this paragraph to such governmental units, or to a group designated by such a governmental unit for the purpose of assisting that governmental unit to carry out its Community Development Program."

Section 570.402(a) of the regulations defines technical assistance as:

> "the transfer of skills and knowledge in planning, developing, and administering the Community Development Block Grant program from those individuals and institutions which possess them to eligible block grant entities and affiliated CDBG participants which need them (570.402(c)). The assistance is to increase the effectiveness with which eligible block grant communities can use Community Development Block Grant funds to meet community development national and local program objectives."

In order for "evaluation studies" to be eligible for section 107(a)(8) funding, the studies must come within the purview of the foregoing. We assume that you intend to enter into contracts with individuals or organizations which will undertake to examine the implementation of Community Development Programs by a community development block grant recipient or by a group of recipients and to judge the strengths and weaknesses of the Programs. These judgements will be published and made available to other community development block grant recipients or to potential recipients. We further assume that the purpose of making such material available is to assist the users in increasing the effectiveness with which they can use CDBG funds to meet community development national and local program objectives. If these assumptions are correct, it is our opinion that the statute and regulations permit the funding of the evaluation studies with section 107(a)(8) funds.

We recommend that in negotiating the contracts for the evaluation studies that the Statement of Work include a requirement for the contractors to demonstrate how the results of the study can assist block grant recipients or potential recipients with the planning, development and administration of CDBG assistance.

(signed) Vincent R. Landau

for Associate General Counsel

August 30, 1979

Mr. Samuel P. McChesney, III
4140 Broadway
Kansas City, Missouri 64111

Dear Mr. McChesney:

The following comments are made in response to your letter of August 24, 1979 regarding Atchison's use of block grant funds to acquire land and then donate the land to a private developer.

We are of the opinion that a city under the community development block grant program can use grant proceeds to acquire title to real estate for purposes which contemplate housing development. (please reference 24CFR 570.201(b), as revised March 1, 1978).

Our comments are based solely upon federal regulations. The city must determine for itself whether or not any state or local law would be violated if the property is donated to a private developer.

If you have any questions regarding this matter please contact Doug Loos at 374-4357.

Sincerely

William G. Nichols

William G. Nichols
Area Counsel

SEP 28 1979

Clyde T. J. McHenry, Deputy Assistant Secretary
for Public Housing and
Indian Programs, HC
Attention: Milton Slifkin GUB

Robert S. Kenison, Urban Development Division, GU

Use of FY 1979 CDBG Funds by City of Chicago for "Modernization" of Low-Income Public Housing Projects by Chicago Housing Authority

This responds to your memorandum regarding the eligibility of two different types of possible CDBG assistance by the City of Chicago to the Chicago Housing Authority. The City of Chicago has budgeted $3.8 million of its FY 1979 CDBG funds for use by the Chicago Housing Authority for "modernization" of low-income public housing projects. You have requested a determination by this office of the eligibility under the CDBG program of the following activities:

1. The use of these CDBG funds for "cycle" painting, described to us as nonroutine interior painting of over 14,300 units of low-income housing projects owned by the Housing Authority.
2. The use of these CDBG funds to underwrite a portion of the current operating deficit of the Housing Authority (i.e., as an operating subsidy).

We will consider first the question of using CDBG funds to underwrite a portion of the current operating deficit of the Chicago Housing Authority. This is not an approvable activity under the CDBG program. First, as we understand the fact situation, the activity described in the FY 1979 CDBG application is "modernization of low-income housing projects owned by the Chicago Housing Authority." Thus, the CDBG application and agreement does not authorize the use of these funds as an operating subsidy. Secondly, even if the CDBG agreement were amended to provide for the use of these funds as an operating subsidy rather than for a modernization activity, the use of CDBG funds to provide an operating subsidy to the Chicago Housing Authority is ineligible under § 570.207(c) of the CDBG regulations. Paragraph (2) of that section specifically lists the "payment of salaries for staff, utility costs and similar expenses necessary for the operation of public works and facilities" as one of the examples of activities which are not eligible. The general rule is that any expense associated with operating, maintaining, or repairing public facilities and works is ineligible for assistance unless specifically made eligible elsewhere under the regulations regarding eligible activities. Since the operating subsidy is not an eligible activity under the regulations, nor do we believe there to be a statutory basis for such eligibility, the proposed use of CDBG funds for this purpose cannot be legally approved. In regard to the proposed activity described as "cycle painting," the eligibility of this activity depends upon whether it is specifically eligible as public housing "modernization" under § 570.202(b), and therefore not prohibited as a maintenance and repair activity under the general ineligibility provisions of § 570.207(c).

While the term "modernization" is not defined in the CDBG regulations, the definition is found in the HUD regulations dealing with the Department's Modernization Program for Low-Income Public Housing as well as in HUD Handbook 7485.9 for the Modernization Program for Low-Income Public Housing. "Modernization" is defined in § 868.2 of those regulations as:

> "capital improvements, such as alterations, betterments, additions, replacements, or Major Repairs, that appreciably extend the useful life of the property (site, structures, or nonexpendable equipment), increase its value or utility, or make it more suitable for its intended use."

Appendix 1 of HUD Handbook 7485.9 lists examples of modernization work items eligible for payment from modernization funds. Appendix 1 specifically restricts the eligibility of repainting of interior and exterior surfaces to that painting which is "directly related to an alteration or improvement."

It is apparent that the proposed painting is not eligible as "modernization," as that term is defined and used in the Department's regulations and Handbook governing its modernization program; and we see no indication in the CDBG regulations that a broader meaning, such as might have been conveyed by the phrase "modernization type rehabilitation," was intended. The obvious conclusion is that the word "modernization" is used as a term of art in § 570.202(b), to be distinguished from the type of rehabilitation activities recognized with respect to private property, for example, as set forth in § 570.202(c)(2).

One of the activities included in § 570.202(c)(2)(ii)(A) is "repair directed toward cure of an accumulation of items of deferred maintenance." Mr. Milton Slifkin of your staff has advised that over $60 million has been provided to the Chicago Housing Authority over the past few years under the Modernization Program for Low-Income Public Housing, and that additional improvements needed because of the financial inability of the housing authority to provide proper maintenance will continue to be performed during the coming year on these housing projects with funds provided under the Modernization Program. Thus, if the housing were privately owned, the proposed cycle painting which has not been performed for the past eight or nine years due to lack of finances, could be eligible under § 570.202(c)(2)(ii)(A) as one component of a rehabilitation effort which includes major repairs directed toward the cure of an accumulation of items of deferred maintenance, the other components of which would be financed with monies from other sources (which is permissible in the CDBG program). Since the limitation on rehabilitation of publicly-owned low-income housing to those activities which qualify as "modernization" is not statutory, it could be waived by Assistant Secretary Embry in this case pursuant to § 570.4 in favor of the broader criteria applicable under the provisions of § 570.202(c)(2)(ii)(A). In accordance with § 570.4, the Secretary may waive any requirement of Part 570 not required by law whenever it is determined that undue hardship will result from applying the requirement and where application of the requirement would adversely affect the purposes of the Housing and Community Development Act of 1974, as amended (the Act).

All of the criteria for a waiver appear to be present here. First, HUD is not required by the Act to restrict rehabilitation of public housing to those activities which are eligible under the Modernization Program for Low-Income Public Housing. Secondly, and according to your memorandum, the Chicago Housing Authority is one of the most seriously financially distressed public housing authorities in the United States. The painting of the dwelling units has not been done in eight or nine years. If the painting is not financed with CDBG funds, the dwelling units in all likelihood would be left to further deterioration. Finally, the proposed cycle painting would provide 100 percent benefit to low-income persons who are tenants in these projects. The CDBG recipient in this case, the City of Chicago, has already budgeted $3.8 million of its FY 1979 CDBG funds for the modernization of the housing projects owned by the Housing Authority. Restriction of rehabilitation under § 570.202(b) to only modernization activities eligible under 24 CFR § 868.2 and HUD Handbook 7485.9 for the regular Modernization Program would adversely affect in this instance the specific objective set forth in the Act of conserving the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income [see section 101(c)(3) of the Housing Act of 1974]. Accordingly, we believe a satisfactory basis exists for a waiver of § 570.202(b) limitation to permit the proposed cycle painting.

Other proposals for the use of CDBG funds to paint low-income public housing projects should be reviewed on a case-by-case basis, to determine whether a similar waiver is justifiable, if desired.

Robert S. Kenison

Robert S. Kenison

Robert J. Matuschek, Director
Office of Regional
Community Planning and
Development, 8C
8G

August 1, 1979

Jack B. Toll, Office of Regional Counsel, 8G

Small Cities Applications "on behalf of"

This memorandum is written in response to several problems that arose during the last Small Cities round of applications. If an applicant, usually a county, comes in with an application which proposes activities within its jurisdiction and also within the jurisdiction of other local governing bodies, for example, towns, then that application is to be considered "on behalf of" such other jurisdiction, regardless of how that application is labeled.

There are a few exceptions to this rule. For example, a county may construct a neighborhood facility within the jurisdictions of a town, but if the purpose of that facility is to serve residents of the county outside the town then it is not an application "on behalf of". The same would be true if a city constructs a water and sewer facility outside the city limits, but the beneficiaries of such facility are the city residents. However, if a county proposes to do rehabilitation within one or many of the towns or cities in its boundaries, then such an application is an "on behalf of" application. The effects of being included in an "on behalf of" application, pursuant to 24 CFR 570.421(c) is that the included local government may not submit its own application for Small Cities funds. Therefore, it is important that this be explained at the workshops and it is also important that the CPD Representatives be sensitive to this possibility.

If you have any questions, please feel free to contact Myndie Brown at Ext. 4148.

Jack B Toll
Regional Counsel

Robert C. Embry, Jr., Assistant Secretary
for Community Planning
and Development, C

SEP 17 1979

GUB

Robert S. Kenison, Urban Development Division, GU

Paintsville, Kentucky Unresolved Audit Findings 1, 2, 3, 4 and 5
Audit Period 5/12/75 - 4/30/78

This is in response to your request for concurrence on a proposed memorandum authorizing a plan for withholding the balance of the Paintsville, Kentucky FY 1978 hold-harmless grant to clear unresolved audit findings of certain disallowed costs. We are returning the item without concurrence.

The City's unexpended FY 1978 funds, as well as its FY 1979 allocation (which was not approved because the application was submitted after the filing deadline) are proposed to be reallocated for competition under the FY 1979 nonmetropolitan balance.

Your memorandum proposes to clear the outstanding audit findings by reduction of the FY 1978 grant balance in the amount of $95,765, as a satisfactory sanction against the City "as provided in § 570.909 and § 570.913(b)(2) of the community development regulations." However, none of the procedural requirements required by § 570.913(b) have been met.

The City's July 2, 1979, letter agreeing to a reduction of its FY 1978 grant was in response to the June 25, 1979, letter from the Louisville Area Office, which advised the City that HUD could withhold the entire FY 1978 balance because it had "the authority to recoup an amount greater than the original transgression pursuant to § 570.911." Since § 570.911 applies only to reducing subsequent year grants, i.e., FY 1979, and the § 570.913(b) opportunity for hearing pursuant to the procedural provisions of that section were not offered, the City's letter authorizing HUD to reduce its FY 1978 grant cannot be viewed as an informed waiver of its rights.

A second issue is the "reprogramming" of almost 40 percent of the FY 1978 funds for repayment of the City's urban renewal loan without a program amendment pursuant to § 570.312, an action apparently not taken here.

Perhaps the City's written waiver to its § 570.913(b) hearing rights can still be obtained under an arrangement to deduct the loan amount from its FY 1979 hold-harmless allocation.

Robert S. Kenison

Associate General Counsel

SEP 24 1979

Arthur J. Gang, Associate General Counsel
for Litigation, GT

GUB

Robert S. Kenison, Urban Development Division, GU

St. Louis County v. HUD

This is in response to your request of August 27, 1979, that we consider issues raised in the above-captioned case, particularly whether the conditional approval of the St. Louis County application was tantamount to a "disapproval" which required notice by the Secretary within 75 days. For the reasons stated below, we are of the opinion that the conditional approval of St. Louis County's application was not tantamount to a disapproval under section 104(c) of the Act, but was permissible administrative action based on the statutory authority of the Secretary to review grantee performance.

As you know, section 104(d) of the block grant statute provides that:

> "The Secretary shall, at least on an annual basis, make such reviews and audits as may be necessary or appropriate to determine whether the grantee has carried out a program substantially as described in its application, whether that program conformed to the requirements of this title and other applicable laws, and whether the applicant has a continuing capacity to carry out in a timely manner the approved Community Development Program. The Secretary may make appropriate adjustments in the amount of the annual grants in accordance with his findings pursuant to this subsection."

Based on the review authority contained in the statute, the regulations provide for Secretarial performance reviews in § 570.909, contract conditioning in § 570.311(f) (and § 570.910(b)(9)), and grant adjustments in § 570.911.

With respect to conditional approvals, § 570.311(f) authorizes the Secretary to approve conditionally applications where there is substantial evidence that there has been, or there will be, a lack of substantial progress, nonconformance, noncompliance or a lack of continuing capacity as described in § 570.909. The regulations provide that action under this section results in the full entitlement amount being approved, subject to the conditions imposed. However, a failure to satisfy an imposed condition subjects the grantee to a reduction in the annual grant pursuant to § 570.910(b)(10) of the regulations. We have determined that entitlement applicants must be notified within 75 days of any contract conditions, otherwise the application is approved pursuant to section 104(f) of the Act and § 570.311(d) of the regulations, in the full entitlement amount without conditions. The conditional approval regulations were issued very early in the program and have been specifically upheld in two decisions, Coos Bay v. HUD and Smithtown v. HUD.

While the Act does not explicitly authorize conditional approvals, we are of the opinion that § 570.311(f) is legally supportable as an administrative remedy attendant to the statutory authority to review grantee performance. In other words, if on the basis of a section 104(d) and § 570.909 performance review, the Secretary determines that remedial action is appropriate, it is consistent with the statute to impose reasonable conditions tailored to securing program compliance. The overall objective of such conditions is to secure program performance without the necessity of invoking the more severe, irremediable sanctions authorized by the statute.

In specifically upholding the Department's authority to condition grants based on a review of a recipient's performance, Judge Sifton in the Smithtown case expressed a similar view:

> "In light of the fact that section 104(d) of the Act also provides that as a result of and in accordance with the findings of the annual review, the Secretary may [make] appropriate adjustments in the amount of the grant, the regulations permitting the lesser remedy of a conditional approval of the succeeding year's grant cannot be considered inconsistent with the statute." (Page 10.)

In the case at hand, the Department notified St. Louis County within the 75 day period that its application was conditionally approved pursuant to § 570.311(f) due to a lack of substantial progress by the County in meeting its housing goals. As stated above, in taking this action, the full entitlement amount was approved but the obligation and utilization of funds have been restricted until the County takes corrective action to remedy past poor performance.

Plaintiff also asserts that a controversy exists as to whether the Department can condition an application without first submitting to plaintiff "substantial factual data and bases" which plaintiff alleges to be required by § 570.311(f). This provision does not require that we submit such data to plaintiff, but states that there must be substantial evidence that there has been or there will be, a lack of substantial progress, nonconformance, noncompliance, or lack of continuing capacity. It is our understanding that on several occasions the Area Office notified the County (by letters and meetings) of the bases for our conclusion regarding poor HAP performance.

3

Finally, with regard to Area Director Bullock's statement in the letter to the City of May 15, 1979, that the City's application was plainly inappropriate, it should be emphasized that Central Office made no determination that the application was disapprovable. Field Offices have not been delegated the authority to disapprove grants. Thus, Mr. Bullock's letter must be construed as a letter expressing the Area Office view that the HAP, as submitted, was plainly inappropriate. On June 29, 1979, after review by the Central Office, the City was notified that the application was approved subject to the conditions noted.

We are attaching, as additional background material, a General Counsel's opinion of April 28, 1976, which first spelled out our view of the basic concepts of administrative and statutory remedies and sanctions, including contract conditioning, under the block grant program.

(signed) Vincent R. Landau

for Associate General Counsel

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Robert J. Matuschek, Director
Office of Regional
Community Planning and
Development, 8C

DATE: September 28, 1979

IN REPLY REFER TO:
8G

FROM : Jack B. Toll, Office of Regional Counsel, 8G

SUBJECT: Designation of "Chief Executive Officer"
in the CDBG Program

This memorandum is to explain the ramifications of the term "Chief Executive Officer." 24 CFR 570.3(d) defines the Chief Executive Officer of a unit of general local government as being the "Elected official, or the legally desiginated official, who has the primary responsibility for the conduct of that unit's governmental affairs." That provision goes on to give examples. "The elected mayor of the municipality; The elected county executive of a county; the chairman of a county commission or board in a county that has no elected county executive; the official designated pursuant to law by the governing body of the unit of general local government."

The determination of whether in any particular circumstances the mayor or the city manager is the chief executive officer of a city depends on state and local law. In a chartered city, the charter will spell out which official is the "legally designated official who has primary responsibility for the conduct of the city's governmental affairs."

When an application or a grant agreement comes into HUD signed by either the mayor or the city manager, HUD will assume that the signatory is the official who has the authority to do so under state and local law. When any questions are directed to you as to whether an agreement should be signed by the mayor or the city manager, or whether a grant can be signed by some other individual designated by the city council, the proper response is that it is up to the city attorney to determine. In any given situation it may be the mayor or the city manager or such other person designated by the city council but in the latter case only if the city council has authority under local law to designate the chief executive.

HUD-56 (7-75)

PREVIOUS EDITION IS OBSOLETE

Involvement in local affairs is to be avoided by us. Therefore, please refer any marginal cases to the determination of the city attorney, we will rely on that individual's opinion as to which official has the authority under local law, i.e., who has the primary responsibility for the conduct of governmental affairs.

If you have any questions please contact Myndie Brown at 4148.

Regional Counsel

DEC 2 -

Robert C. Embry, Jr., Assistant Secretary
for Community Planning
and Development, C

GUB

Robert S. Kenison, Urban Development Division, GU

Paintsville, Kentucky, Unresolved CDBG Audit Findings

This is a follow-up to a prior memorandum on the above subject, dated September 17, 1979, declining concurrence on a proposed resolution of certain audit findings in the Paintsville, Kentucky, hold-harmless grant program. We have since reviewed a revised draft memorandum from you to Assistant Inspector General for Audit, John C. Yasurlo, which also does not appropriately address our concern that the grantee did not waive its administrative hearing rights under § 570.913(b), which was the basic reason for our initial nonconcurrence.

Vincent Landau, of our Block Grants Branch, has discussed the matter in detail with Dave Miller of CPD, as well as the Louisville, Kentucky Area Office CPD Representative, Cal Ross. Based on the discussion with Mr. Ross, the Area Office knowingly offset the previously approved FY 1978 grant by the amount of the disallowed costs in disregard of the procedures under § 570.913(b). The grantee was advised by the Area Office in writing that HUD could reduce its current FY 1978 grant by even more than the disallowed costs under the provisions of § 570.911 if it did not agree to the reimbursement. The grant reduction authority of that section is only applicable to future entitlement grants and the grantee's agreement in response to the Area Office letter does not constitute a waiver of its § 570.913(b) rights as contended by CPD. Moreover, a grant reduction under either section by the Area Office violates the CDBG delegations of authority, which reserve such actions to the Central Office.

Under the circumstances, OGC will concur in a resolution of the audit exceptions if the Paintsville FY 1978 grant is closed out pursuant to the "termination of grant for mutual convenience" provisions of § 570.512(j) of the block grant closeout regulations published in the Federal Register on October 26, 1979, provided the closeout record appropriately reflects the grantee's consent. Mr. Ross was therefore advised by Mr. Landau that the Certificate of Completion required under paragraph (h) of that regulation, which is to be executed by the grantee, must be amended to state that the grant was terminated pursuant to § 570.512(j) of the block grant regulations by mutual agreement, including waiver by the grantee of the provisions of § 570.913(b), to clear all outstanding HUD audit exceptions by a reduction in the grant in the amount of the disallowed costs. A copy of the executed Certificate of Completion and Final Costs, as so amended, should be transmitted to CPD to assure that the closeout procedure was followed.

In addition, we would urge that the Area Office be advised by CPD of the limitations on field office authority with respect to funding sanctions under the delegations, particularly since Mr. Ross indicated similar procedures reducing grants have been followed in other cases. Perhaps it would be advisable to send a copy of the CDBG delegations to all offices with a review of sanctions which require Central Office approval.

(signed) Vincent R. Landau
for Associate General Counsel

AUG 22 1979

NOTE TO MR. CORDISH

SUBJECT: UDAG - Eligible Applicants - Inquiry from City of Baton Rouge, Louisiana

This will reply to an informal inquiry made by Mr. Ridenour of your staff regarding the eligibility of the City of Baton Rouge, Louisiana, for an urban development action grant. The City forms a part of the City/Parish of Baton Rouge, which combines the City and the adjoining unincorporated area of East Baton Rouge Parish. The City/Parish of Baton Rouge is an entitlement grantee as a "metropolitan city," as defined in section 102(a)(4) of the Housing and Community Development Act of 1974.

Governmental functions for the City/Parish are merged for some purposes, but there are also some separate jurisdictional functions, and a separate City Council and Parish Council do exist. Because only the City of Baton Rouge meets the distress criteria set forth in section 119 of the Act and the urban development action grant (UDAG) regulations, it seeks to know whether it may apply for a UDAG grant in its own right.

Section 119(b) of the statute authorizes such grants only to "cities and urban counties." Section 102(a)(5) defines the term city to mean "any unit of general local government which is classified as a municipality by the United States Bureau of the Census" or a town or township possessing the powers and functions of municipalities, among other things. Since the City of Baton Rouge does not qualify as a town or township and is not classified as a municipality by Census without the inclusion of East Baton Rouge Parish, it is statutorily ineligible for a UDAG grant.

(signed) Vincent R. Landau

for Robert S. Kenison
Associate General Counsel
for Urban Development

Robert J. Matuschek, Director   August 29, 1979
Office of Regional
Community Planning &
Development, 8C   8G
Attn: Joseph McKeon, Director
Operations Support Division, 8CO

Jack B. Toll, Office of Regional Counsel, 8G

Eligibility of Indian Tribes for Urban Development Action Grants

On August 22, 1979, the Office of Indian Programs requested your concurrence in the attached memorandum to Robert Embry requesting revision of the Urban Development Action Grant Program to permit participation by Indian tribes. At that time, you requested that this office provide you with comments regarding what changes, if any, were required in the UDAG legislation to permit such participation.

Myndie Brown and Ralph Gonzales reviewed Section 119 of the Housing and Community Development Act of 1974, which authorizes Urban Development Action Grants. The minimum amendments necessary are to add the phrase "and Indian tribes" wherever the section refers to "severely distressed cities and urban counties." This addition would need to be made in Section 119(a) on lines 5 and 10; Section 119(b) on lines 2 and 9; and 119(e), lines 5, 7, 10, 11, and 17.

While this is the minimum change necessary, as a practical matter there are several provisions of the Act which effectively exclude Indian tribes and therefore would have to be modified. These areas include the repeated references to "declining tax base" in the legislation. Indians do not have a tax base. Another modification that would be necessary is the requirement that the applicants have "demonstrated results in providing housing for persons of low and moderate income and in providing equal opportunity in housing." The Indian Civil Rights Act permits tribal governments to provide preference for Indians or enrolled members. This would have to be referenced in the Act.

Modifications would be necessary in Section 119(c) where references are made to the "community development program described in Section 104(a)(2) and the Housing Assistance Plan described in Section 104(a)(4)" since the requirements of 104(a)(2) and (a)(4) apply to grants made under Section 106 while Indian CDBG funds are provided under Section 107 and have different community development programs and housing assistance plan requirements.

The requirements of 119(c)(5) should also be modified as citizen participation is handled differently for Indian tribes.

Finally, the UDAG program is geared toward attracting private investment. Because of the unique status of ownership of Indian land, not only is there no tax base but it is also difficult to attract private investment which relies on mortgaging land as security for such private investment. Therefore, again as a practical matter, the Indian tribes would be at a disadvantage with respect to attracting private investment.

These necessary and/or desirable modifications should be addressed in the memorandum to Robert Embry. If you have any questions regarding this memorandum, please contact Myndie Brown at EXT 4148.

Regional Counsel

AUG 2 7 1979

MEMORANDUM TO: Robert C. Embry, Jr., Assistant Secretary
for Community Planning
and Development, C

SUBJECT: Section 810 of the Housing and Community Development Act of 1974: Authority of Public Body-Recipients of Urban Homesteading Properties to Demolish Such Properties

This is in response to your memorandum of April 25, 1979, requesting a legal opinion on the subject. Your memorandum cites several circumstances in which cities which have received title to properties under Section 810 of the Housing and Community Development Act of 1974, as amended ("Section 810"), now seek to demolish those properties. Your memorandum asks whether Section 810(b) gives cities the legal authority to demolish properties received under Section 810 if they hold title to them, and, if a property is subject to a homesteader agreement, what are the homesteader's rights in this situation?

Based upon the research and reasoning in the attached memorandum, the following are our legal conclusions with respect to the issues you raise:

1. Demolition or non-homestead use of a property transferred to a locality pursuant to Section 810 is not prohibited by that statute, where residential homesteading of the property is determined to be infeasible and the alternative use is consistent with the "coordinated approach toward neighborhood improvement" for the area.

2. The locality is responsible for proposing and carrying out demolition of the property and any alternative use, using other than Section 810 funds (which are available to localities only for technical assistance under Section 810). Since Section 810 properties are typically conveyed by HUD to localities without technical use restrictions or reverter clauses, these properties cannot be recaptured by HUD in the event of unauthorized demolition or other program violations, except through voluntary reconveyance or legal action based upon the locality's failure to comply with its approved program. In view of the availability of other remedies, reconveyance should not be accepted nor legal action undertaken unless such action is estimated to be of economic benefit to the United States.

3. HUD is responsible for either setting standards by regulation to authorize localities to make the determinations cited in our first conclusion or for directly making those determinations. In the absence of regulations providing the necessary authority and guidance to localities, HUD may on an interim basis make such determinations in the context of approving amendments to local urban homesteading programs, which are proposed by localities to authorize demolition and alternative use of one or more specifically identified Section 810 properties. Approval of these amendments should be based upon an adequate administrative record, which is discussed more fully in Section IV of the attached memorandum. When the record shows inadequate local execution of the homesteading program, approval may be withheld or may be granted conditioned upon the accomplishment of specified corrective measures, and remedial action pursuant to 24 CFR 590.21 or 590.33 may also be necessary.

4. The foregoing conclusions generally apply also to cases in which localities have conditionally conveyed Secretary-owned properties to homesteaders. In addition, however, the administrative record in such cases must include consideration of the legal rights pursuant to Federal and State law of the homesteader under his homesteader documents (See Section V of the attached memorandum).

5. Area Managers and Regional Administrators have formal authority under published Departmental delegations to approve or disapprove amendments to local urban homesteading programs proposed by localities. However, in view of the absence of any outstanding regulations, policy or instructions specifically concerning these amendments, we strongly recommend that no such decisions be made in the field until a Notice or memorandum to Area Managers and Regional Administrators is dispatched providing adequate interim instructions.

Final decisions on the specific examples cited in your memorandum should be possible in accordance with this opinion once the facts are fully developed. However, if you need further advice from this Office with respect to those cases or any other cases of this type, please do not hesitate to contact us. In addition, we note that much of the advice in this memorandum concerns what to do in the absence of regulations adequately specifying the actions necessary or determinations required by either HUD or the locality when homesteading a Section 810 property has become infeasible. Appropriate regulations should be developed to deal with this situation in a comprehensive and effective way.

Amendments to 24 CFR Part 590 could be developed to obviate the need for specific HUD approval of the demolition or change in use of individual Section 810 properties in most cases, by requiring localities to develop the administrative record and make the determinations necessary for such actions. Such regulations, in addition to clarifying for field personnel what is likely to become an increasingly common problem, would provide better notice to localities of what is required or prohibited and a stronger basis for remedial action in the event of violations. At least on first impression, there appears to be considerable potential for unfavorable media, GAO, and Congressional attention with respect to cases like the hospital condemnation case cited in your memorandum, if this gap in the regulations is not filled. We are available to advise your staff in the development of these regulations.

Edward W. Norton
Acting General Counsel

Attachment

LEGAL MEMORANDUM

After the initial section below, this memorandum is organized for convenience in the sequence in which the conclusions in the attached opinion are presented.

I. Description and Purpose of Urban Homesteading Legislation.

Section 810(a) authorizes the Secretary to transfer to eligible public bodies without payment unoccupied, one-to-four family, Secretary-owned residential properties. These properties must be requested by the local homesteading agency for use in an urban homestead program approved by the Secretary under Section 810(b). In connection with such transfers, Section 810(a) requires that the Secretary determine the suitability of the property for use in an urban homestead program based upon a number of factors, among which are the benefits to the community and the reduced administrative costs to the Federal Government resulting from expedited occupancy of the property. Also in connection with such transfers, Section 810(g) (which primarily authorizes appropriations for Section 810) permits Section 810 funds to be used to reimburse the Department's "housing loan funds" for properties transferred pursuant to Section 810. After transfer, the local homesteading agency is responsible for carrying out the homestead program, which entails conditional conveyances of such properties without substantial consideration to equitably selected homesteaders, who must occupy the properties for at least three years and must make required repairs under an agreement with the local homesteading agency, before unconditionally obtaining fee simple title. In addition, an approved urban homestead program is required to include "a coordinated approach toward neighborhood improvement through the homestead program and the upgrading of community services and facilities."

From the language of the statute and its legislative history, it is clear that the urban homesteading legislation was primarily intended to foster expedited owner-occupancy and rehabilitation of abandoned or unoccupied urban dwellings, directly increasing the useable local housing supply and also contributing to the improvement of neglected urban neighborhoods. (See H. R. Rep. 93-1279, pp. 170-171 /Conf. Report/ and S. Rep. 93-693, pp. 86-87 /Senate Committee Report/. Similarly, the program regulations provide at 24 CFR 590.3 that:

> "The purpose of the urban homesteading program is to utilize existing housing stock to provide homeownership . . . . The program will provide for the transfer . . . /of suitable properties/ for use in an approved urban homestead program." /See also certification provisions at 24 CFR 590.11(b)(2)(i), (ii), and (4)/.

II. Permissibility of Demolition of Section 810 Properties under Limited Circumstances.

It is apparent that the urban homesteading legislation was not enacted for the purpose of providing localities or individuals with vacant lots for various purposes or inexpensive sites for public facilities. It is equally clear that demolition of residential property is inconsistent with the urban homesteading concept itself and, if not carefully limited and circumscribed, could result in abuse of the Section 810 authority. In particular, for a locality to request or for HUD to transfer properties under Section 810 knowing that those properties cannot be repaired and require immediate demolition, or intending that the properties or their sites be used for non-homestead purposes, would obviously be inconsistent with the principal purpose of Section 810, as well as contrary to its express language that properties are to be requested by localities, and determined suitable by the Secretary, "for use in an urban homestead program." In addition to circumventing Section 810, any such transfer would also bypass normal HUD property disposition procedures. For properties which clearly require immediate demolition, there has long existed authority under the National Housing Act for HUD itself to contract for demolition, or to turn properties over to localities in exchange for undertaking demolition work, when this is in the best interests of the FHA mortgage insurance fund.

Despite the inconsistency of demolition with the homesteading concept, however, demolition (or other non-homestead use) of properties already transferred to localities in good faith under Section 810 is not expressly barred by the statutory language or even mentioned in the legislative history, so there is room for statutory interpretation. In our opinion, the words "for use in an urban homestead program" concern primarily the purpose or intent of the transfer of Secretary-owned property to the locality; they do not establish an inflexible requirement that a property already transferred to a locality under Section 810 must in fact be homesteaded, no matter how exorbitant the cost to the locality of securing a homesteader or how unsuitable the dwelling unit or its location may prove to be for residential homesteading. While Congress certainly could have specifically required such an apparently unreasonable result, in general a statute should not be interpreted to reach an unreasonable result unless the language is clear, and here it is not that clear. In addition to the failure of the statute to deal with the issue of disposition of Section 810 property if homesteading proves infeasible, there is affirmative reason to believe that this issue was intentionally left by Congress for administrative resolution by HUD.

First, paragraph (6) of Section 810(b) requires that an approvable urban homestead program provide "a coordinated approach toward neighborhood improvement through the urban homestead program and the upgrading of community services and facilities" /hereinafter referred to as the "coordinated approach toward neighborhood improvement"/. An undesignated sentence at the end of Section 810 further provides that: "The Secretary may approve such other programs as he determines reasonably fulfill these criteria." The latter provision signifies a Congressional intent of deference to the discretion of HUD with respect to the detailed content of local urban homesteading programs; the former indicates that achieving general neighborhood improvement, in addition to the occupancy of abandoned dwellings, was a secondary, or more general, purpose of the urban homesteading legislation. This general neighborhood improvement goal, and the specific desirability of eliminating the blighting influence of abandoned buildings in the neighborhood, was frequently mentioned in the Congressional debate on two bills introduced in 1973 (H. R. Rep. 10373; S. Rep. 2676, 93d Cong., 1st Sess.), which were passed by their respective Houses of Congress in 1974, the Senate's version finally being enacted as Section 810. If no alternative use or disposition program could be carried out with respect to property when homesteading proves infeasible, the blighting influence of the property would continue, and the general neighborhood improvement purpose of the legislation would be frustrated. However, whether such an alternative disposition program, which may include demolition, is necessary and what it should be depends upon the exercise of judgment in light of the particular circumstances applicable to each property - a proper subject for administrative, rather than statutory, resolution.

Second, the possibility of homesteading proving infeasible after a property has been transferred under Section 810 seems so clear from the design of the program that Congress can be presumed to have been cognizant of it. This gives further weight to the interpretation that the statute's silence on this subject represents a license for reasonable, flexible administrative actions consistent with the statute's purposes, rather than a restriction of the use of Section 810 properties to homesteading, no matter what the circumstances. The potential for homesteading proving infeasible after transfer arises from several related aspects of the urban homesteading program: the "two stage" process by which properties reach the individual homesteader from HUD, the involvement of the locality as the intermediate transferee in that process, the locally-conducted nature of the urban homesteading program, and the nature of the properties with which urban homesteading typically deals. The first three aspects of the program are part of a clear choice by the Congress in enacting Section 810 between two different types of urban homesteading programs that were being considered. This feature of the legislative history is discussed more thoroughly in the next section of this memorandum, but the immediate significance of these aspects is that the ultimate transfer of fee title from the Secretary to the homesteader is a lengthy process (always over three years), which inevitably allows all kinds of changes in circumstances to occur, which in turn may effectively make homesteading infeasible. As to the nature of properties used for homesteading, the legislation presumes that properties transferred under the program will be in condition to be habitable with such repairs or improvements as homesteaders may reasonably be expected to make under the criteria in Section 810(b)(3)(B) and (C). However, this is obviously a difficult judgmental decision that events may prove wrong. Because the program was designed to deal with less valuable properties that might not be saleable at a profit through normal HUD property disposition channels (worth less than $15,000 per single family unit, and $5,000 more for each additional unit up to three), the chances for errors in judgment in selecting properties for homesteading are substantial. In view of the substantial potential for difficulties in the homesteading process, whether because of changes in circumstances after the property was transferred or because of errors in selecting properties, what locality would request a property for homesteading if there was no reasonable opportunity for relief from the homesteading obligation?

In short, we think an interpretation of the statute that too severely restricted the use or disposition of Section 810 properties if homesteading proves infeasible would unnecesarily discourage localities from participating in the program and would thereby detract from achieving the purpose of the program, rather than contributing to that purpose.

For all of the reasons above, we think that the only reasonable interpretation of Section 810 is that it does not prohibit the demolition or non-homestead use of a property already transferred to a locality pursuant to the statute, if homesteading that property is administratively found to be infeasible. However, in such a case, since the property was transferred for use in an urban homestead program and was the basis for a transfer payment of Section 810 appropriated funds to the FHA mortgage insurance accounts, the "coordinated approach toward neighborhood improvement" aspect of the urban homesteading program should be given effect to the extent possible. Therefore, the alternative use for the property should be found consistent with the "coordinated approach toward neighborhood improvement" for the homesteading neighborhood. The next section of this memorandum deals with the relative responsibilities of HUD and the locality in proposing, carrying out, financing, and approving or setting standards for demolition and/or alternative use of properties transferred under Section 810. Section IV contains further discussion of the meaning of "infeasible for homesteading" and "consistent with the coordinated approach toward neighborhood improvement" in relation to the three examples cited in Mr. Embry's memorandum of April 25, 1979.

III. Relative Responsibilities of HUD and the Locality with respect to Program Administration and Execution.

A. General

Under Section 810, HUD is specifically responsible for determining properties suitable for use in an urban homestead program, for transferring such properties without payment to eligible localities, for approving the local urban homestead program based upon the criteria in the statute (or such programs as HUD determines reasonably fulfill those criteria) and for issuing rules and regulations as necessary to carry out HUD's functions under Section 810. A locality participating in the urban homestead program is responsible for requesting properties from HUD (from a list provided by HUD and within the criteria set by HUD's regulations, see 24 CFR 590.17) and for financing and carrying out the local urban homestead program, including the coordinated approach toward neighborhood improvement, the selection of properties and their conditional conveyance to homesteaders, setting and monitoring compliance with rehabilitation requirements, and the conveyance in fee simple to homesteaders who complete their homesteading obligations. Under the statute, HUD is also specifically responsible for the "continuing evaluation" of programs carried out pursuant to Section 810, and for summarizing and reporting its recommendations to Congress based upon that evaluation. Of course, as the Federal agency responsible for functions authorized by Federal statute, HUD is generally responsible for overseeing local compliance with the statute and for applying appropriate sanctions in the event of noncompliance.

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In general, we think it is consistent with the foregoing statutory scheme for the locality to be responsible for proposing, carrying out, and financing demolition and/or alternative use of properties to which the locality holds title pursuant to Section 810, and for HUD to be responsible for either approving or disapproving demolition and/or alternative use or for setting standards by regulation for local determinations concerning demolition and/or alternative use.

B. Local Responsibility for Proposing, Carrying Out, and Financing Demolition and/or Alternative Use.

The fact that such activities are similar to the locality's responsibilities for direct program execution is one reason for finding local responsibility for them consistent with the statutory scheme outlined above. However, this conclusion is also supported by the legislative history and by the fact that title to properties has thus far been transferred by HUD to localities for homesteading purposes without technical deed conditions or reverter clauses, a practice itself supported by the legislative history. The urban homesteading legislation was urged upon its sponsors in Congress by certain cities which already had local homesteading programs (see S. Rep. 96-693, pp. 86-87). The decision to involve local governments in the chain of title and in financing and carrying out the basic elements of the program, such as requesting and accepting properties and conditionally conveying them to homesteaders, and generally to create a locally-administered program, was a definite and conscious choice by the Conference Committee of the Senate's approach to homesteading (see H. R. Rep. 93-1279, pp. 170-171). The Senate's approach significantly differed from the House approach, which provided for a HUD-administered homesteading program involving a conditional conveyance directly from HUD to the homesteader. Under the rejected House approach, title to a homestead property would expressly have remained in HUD until conveyed by HUD to the homesteader after satisfaction of the conditions of a conditional conveyance to the homesteader, and the reversionary interest after such a conditional conveyance would expressly have returned the property to HUD (H. R. Rep. 10373, Section 5(c) and (7), Cong. Rec., Sept. 19, 1973, pp. 30524-25) Under the legislation adopted, the property expressly reverts to the local homesteading agency (Section 810(b)(4)). In addition, Section 810, as ultimately adopted, fails affirmatively to require a conditional conveyance from the Secretary to the homesteading agency, while it does specifically require one from the homesteading agency to the homesteader.

Furthermore, it is probable, although not specifically mentioned in the written legislative history, that the greater administrative convenience to HUD represented by the Senate approach was a major factor in choosing it over the HUD-administered program represented by the House approach. Since HUD properties were being provided at no cost to localities, at their request, and at a possible loss to HUD, it may well have been thought an equitable trade-off to have localities bear the main financial and the major administrative burden of carrying out the program. This is supported by the language of Section 810(a)(5), which contemplates a balancing of relative benefits between HUD and the locality in determining a property suitable for homesteading, and by the limitation in Section 810(c) of grants to localities in connection with the program to grants for technical assistance.

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For HUD either to convey properties conditionally to localities or otherwise require a property's return after conveyance to the locality if it cannot be homesteaded would be similar to the House approach and thus somewhat inconsistent with the foregoing legislative history, although obviously not expressly barred by the language of the statute. Notwithstanding what might conceivably be done to change the program, however, the existing practice is for HUD to convey properties to localities unconditionally. It would be anomalous for HUD to assume responsibility for directly dealing with a property to which a local government holds title, particularly since 24 CFR 590.11(b) requires the locality to certify that "It will, upon conveyance of title from HUD, assume liability for injury and damage by reason of a defect in the dwelling, its equipment, its appurtenances, or any other reason."

A consequence of the unconditional conveyance of Section 810 properties to localities is that HUD cannot recapture title to such a property, notwithstanding its conveyance pursuant to a Federal program, absent a voluntary reconveyance by the locality or a successful lawsuit based upon program violations. Given the present state of the regulations, such violations would probably have to be so severe as to amount to fraudulent conversion of Section 810 properties. Voluntary reconveyance is not recommended unless it is estimated to be of economic benefit to the United States, (including the costs of dealing with the property afterwards. Except for a case involving quite a large number of 810 properties or particularly useful as a precedent, an economic benefit from legal action is unlikely, particularly in view of the other remedies available under the regulations.

C. HUD Responsibility for Approving or Setting Standards for Demolition or Alternative Use of Section 810 Property.

Our conclusion that HUD has such responsibility is based upon analogy to HUD's other specific duties under the statute, as well as HUD's general responsibility as a Federal administrative agency to oversee compliance with the letter and intent of the Federal statutes that it administers. In effect, demolition or other non-homesteading use of properties transferred to localities under Section 810 represents a deviation from the primary purpose for which such transfers are authorized-achieving occupancy and rehabilitation of vacant properties through the homesteading process. Stated another way, properties are transferred under Section 810 "for use in an urban homestead program," and achieving homesteading is the primary purpose of such a program. Another use of the property, even though permissible as an alternative if homesteading is infeasible, is a deviation from such primary purpose. Either way, in our opinion such deviations are permissible only when homesteading is infeasible under the circumstances, and the property's reuse is consistent with the "coordinated approach toward neighborhood improvement." For HUD to fail to limit such "deviations," whether by regulation or by case-by-case review, to those permissible in light of the particular circumstances would be for HUD to fail to oversee compliance with Section 810. Similarly, HUD is responsible for approving local urban homestead programs; therefore, HUD is responsible for specifically approving deviations from those programs (or deviations from the primary purpose of such programs), or for defining by regulation when such deviations are permissible and when they are not.

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Like the statute itself, existing regulations and documents on the homesteading program (24 CFR Part 590) are silent on the specific issue of what may be done by localities with properties transferred under Section 810, if homesteading proves infeasible. Therefore, the regulations fail to provide adequate notice to localities of the specific circumstances in which other uses may be permissible or impermissible. The effect of this, if litigated right now, would probably depend on the facts of the particular case. As an extreme example, if a locality were to request and accept a number of properties under Section 810, make no attempt to homestead them, and simply put them on the market for resale at a profit, a court would proabably hold that the locality's actions were such a clear violation of the obvious purpose of the program that appropriate relief could be granted to HUD. The case would be even stronger for HUD if the evidence were more than circumstantial - if, for example, there was evidence of an actual intent by the locality to obtain properties under Section 810 for the purpose of resale at a profit. On the other hand, if the locality could show that it had made several good faith efforts to secure homesteaders, and in the meantime the property had suffered irreparable damage through vandalism despite the reasonable protective efforts of the city, a court would probably say the city was justified in demolishing the property. Between these two extremes, the outcome of litigation is clearly unpredictable. However, it is clear that the present state of the regulations is ambiguous and confusing on this subject, as is evidenced by the cases cited and the questions raised in your memorandum. Further regulations are clearly needed to set ascertainable, enforceable standards for determining when demolition and/or alternative use of Section 810 properties is permissible and when it is not, or at least to specifically require that localities seek HUD approval for demolition and/or alternative use.

If the regulations are to set standards for local approval of demolition and/or alternative use, they should adequately take into account the primary purpose of the original transfer (i.e., homesteading), the circumstances under which accomplishment of that purpose may become infeasible, the local preference as to reuse of the property in such a case, the consistency of the reuse with the "coordinated approach to neighborhood improvement" the appropriate safeguards or remedies against localities requesting and obtaining properties with no real intention of securing homesteaders for them, and the rights of homesteaders where homesteading which has been begun cannot be completed without the fault of the homesteader. In addition to the other remedies available under current regulations, a possible remedy against localities in effect "profiting" from the misuse of Section 810 properties (we emphasize that such "profiting" at this point is only a potential problem, not a proven fact) would be for the locality to pay HUD the amount of the estimated fair market of the property before transfer to the locality (see 24 CFR 590.5(1); 590.17(b)(3)) or an amount related to the locality's "profit" on the property if it is resold or used as the site for a public facility for which land would otherwise have been acquired at the locality's expense. We recognize that the overall effect on the program of any such system must also be considered and that other disincentives or remedies may be sufficient. Further, we emphasize that any such payment would only be possible under Section 810 as a penalty or sanction in the event of a finding of violation of the statute; to impose it routinely would effectively create a system whereby localities would be buying properties from HUD. Such a system or procedure is beyond the scope of Section 810, which only authorizes transfers of Secretary-owned properties to localities "for use in an urban homestead program" without payment. If localities wish to buy properties from HUD for other than homesteading purposes, they may do so through HUD's usual property disposition procedures.

IV. Recommendations for Interim Actions by HUD to Secure and Process Local Requests to Demolish or to Make Alternative Use of Section 810 Properties, In the Absence of Revised Regulations.

In addition to raising the kind of questions cited in your memorandum of April 25, 1979, we understand that one or more localities have already demolished Section 810 properties without HUD review and approval. Without action to prevent these occurrences, HUD cannot be assured that the purposes of Section 810 are adequately being carried out by localities, and the potential for unfavorable media, GAO, and Congressional attention is obvious. The purpose of this section of this memorandum is to describe HUD actions, including the handling of pending cases, that should miminize the potential for program violations and possible legal problems for the Department until revised regulations can be issued. In addition, further discussion of the findings of "infeasibility of homesteading" and "consistency with the coordinated approach toward neighborhood improvement" in a specific context may assist the drafting of those regulations. While our proposals are probably not the only kind of interim actions that could be taken, we would appreciate the opportunity to comment on any other procedures that CPD may wish to utilize, as well as the opportunity to concur in CPD implementation of our proposals.

Although existing regulations were not intended to deal with the issues raised in your memorandum, there is an arguable interpretation of existing regulations that should assist in dealing with those situations until the regulations can be revised. That interpretation is as follows:

1. 24 CFR 590.7 and 590.11 describe the content of an urban homestead program and the program application, and they do not provide for other than homesteading uses of properties transferred under Section 810; therefore, urban homesteading programs approved by HUD thus far do not provide for alternative uses.

2. Although the regulations do not specifically provide for amendment of approved local homesteading programs, HUD's power to approve local programs implies the power to approve amendments to those programs to the extent otherwise permissible under the statute.

3. Absent approval of such an amendment by HUD, a locality which devotes a Section 810 property to non-homesteading use is liable for sanctions under 24 CFR 590.21 and 590.33 for failure to carry out its program "as approved" (590.21) or "substantially as proposed and approved" (590.31).

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One of the purposes of publication of regulations in general is to give notice of their content to those affected. Where regulations are not clear, specific and understandable, their effectiveness in this regard is diminished, but it can be improved to the extent direct notice can be given to those affected of how the regulations are interpreted by the agency that promulgated them. In the current situation, it would obviously be impracticable to give direct notice to homesteaders or to individuals indirectly affected by the homesteading program, but it should be possible to give to localities participating in the program direct notice of the potential for program violations inherent in using Section 810 properties for purposes other than homesteading. In effect, by adopting the interpretation of existing regulations described above, and by giving appropriate direct notice to localities of that interpretation, HUD can lessen the likelihood and justification for local actions inconsistent with the purposes of Section 810 and can improve the basis for sanctions against localities that take such actions. In addition, localities can be informed in the same communication of the interim procedure to obtain HUD approval of demolition and/or non-homesteading use of Section 810 properties. That should in turn relieve localities of the uncertainty, holding costs and detrimental effect on their neighborhoods associated with vacant properties which cannot be homesteaded.

In order to provide such direct notice, we suggest that a relatively brief letter or HUD Notice be sent to all localities participating in the urban homesteading program. This letter would state that demolition or other non-homesteading use of Section 810 properties is, except under some circumstances, contrary to the purposes of Section 810 and therefore may represent a program violation as to which HUD would have to take appropriate remedial action under 24 CFR 590.21 and 590.33. Then the letter should request the locality, if it believes homesteading to be infeasible with respect to a particular Section 810 property or properties, to submit a proposed amendment to its local urban homesteading program. We would suggest that at least the following information be included in the proposed amendment:

1. Identification by map or address of the location of each affected property;
2. Explanation of what steps the locality has taken toward homesteading each property;
3. Explanation of what steps the locality has taken to protect and/or to insure each property against loss after receiving custody of it;
4. Explanation of why the locality considers homesteading infeasible with respect to each property;
5. Statement of how the proposed use is consistent with the "coordinated approach toward neighborhood improvement";

6. Estimated fair market value of the property in its present condition;

7. Estimated cost of demolition and/or conversion to any alternative use;

8. Estimated savings or return to the locality (if any) as a result of using each property for its new purpose (i.e., if the site is to be sold there will be a return; if the property is to be used as the site of a public facility otherwise needed and for which the locality would otherwise have had to acquire a site, there will be a savings) and;

9. Statement that the locality is authorized under State and local law to demolish and/or to use each property as otherwise proposed.

Finally, the letter should clearly state that HUD will consider any action by the locality detrimental to a Section 810 property prior to HUD approval of the program amendment to constitute a program violation warranting appropriate action.

The goals of HUD processing of proposed amendments to local urban homesteading programs containing requests to demolish and/or to make alternative use of Section 810 properties should be to assure that the locality has and will continue to request properties under Section 810 for homesteading purposes and not for other reasons, that the locality's procedures and efforts for achieving homesteading are reasonable and effective, that homesteading is only being abandoned when it is infeasible, that the new use for the property is consistent with the "coordinated approach toward neighborhood improvement", and that appropriate sanctions (or conditional approvals or disapprovals of proposed amendments) are applied when these goals are not met. On the other hand, localities should not be discouraged from requesting properties and utilizing the homesteading program by overly harsh conditions or sanctions.

To the extent there is a clear administrative record showing that an agency's action was based upon consideration of the relevant factors and did not involve a clear error of judgment, the ability of the agency's action to withstand judicial review is strengthened (see generally Citizens to Preserve Overton Park v. Volpe, 401 (1971)). While it is not possible to discuss the administrative record concept in detail here, the locality's request is part of the administrative record, the HUD response to the locality is another part, and the internal HUD consideration of the request is also part of that record. Formal findings of fact are not required; well-reasoned consideration of the local request in light of the goals outlined above and the further advice below should create a sound administrative record, if the substance of that consideration is either memorialized in internal correspondence or set forth as reasons for the HUD action in HUD's response to the local amendment request.

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Using the three situations cited in your memorandum of April 25, 1979, as examples, we have the following additional comments on the amendment of local urban homesteading programs. These comments primarily concern the meaning in a specific context of "infeasibility" of homesteading and "consistent with the coordinated approach toward neighborhood improvement." Concerning the first situation, you indicate that there is "an inability to attract homesteaders regardless of the city's good faith effort to select and homestead the property." If a locality has in fact made a good faith property selection and several good faith attempts under procedures which are reasonable and normally effective to secure homesteaders for a property and has been unsuccessful, then we would agree that homesteading that property has been shown by experience to be infeasible, and a demolition request could be approved. The next question concerns what the locality plans to do with the site after demolition. It would not, we assume, be consistent with the "coordinated approach toward neighborhood improvement" for the locality to leave an ugly or dangerous vacant lot after demolition, so at a minimum the locality should be required to level the lot and plant grass, or the like. This could be made a condition of approval of the amendment, as could other reasonable public actions or uses consistent with the "coordinated approach." In addition we see no reason why the locality could not sell the lot for a HUD-approved use in furtherance of the "coordinated approach toward neighborhood improvement" with disposition controls sufficient to assure that the property is so used by its buyer. Finally, it is possible that an alternative use for a property might be justifiable even if the property were not demolished. For example, a property might prove to be so located as to be inappropriate for residential use, or it might not be capable of rehabilitation within the resources available to homesteaders, but it might in either case be capable of rehabilitation for commercial or institutional use. If the alternative use was consistent with the "coordinated approach toward neighborhood improvement," a local request to amend the local homesteading program as to that property could be approved.

In the second situation cited, there has been "further depreciation of the property due to fire or vandalism." This could be due to inadequate property management procedures by the locality after it received the property, in which case an appropriate sanction aimed at correcting local procedures might be in order. But, whether or not sanctions are called for, the key issue in this case is whether the property is in such poor condition that further homesteading efforts would be futile, even if there have been no such efforts so far. If so, immediate demolition could be approved, and the reuse of the site could be handled as discussed in the preceding paragraph. Obviously, this is a difficult judgment in marginal cases, and one additional homesteading attempt might be required (by conditional approval) if the condition of the property was on the borderline. If necessary to verify the condition of the property, HUD might request photographs or an independent engineering report, or could order an inspection or appraisal of the property by HUD personnel or a fee appraiser.

The third situation you cite (condemnation of an area for a hospital site) is clearly the most difficult and troublesome. Obviously, the existence of homesteading properties in a neighborhood should not foreclose the neighborhood forever to other uses, which may be of higher local priority. On the other hand, for the issue to continue to be dealt with in the context of the urban homesteading legislation, there must continue to be a viable local homesteading program in the neighborhood. In addition, the acquisition or potential acquisition of a sizeable area for non-homesteading purposes may well be evidence of an improper intent by the locality in requesting the properties for homesteading, or at least evidence of poor local planning, coordination, and execution of the homesteading program. The case is doubly troublesome if homesteaders will be displaced in connection with the apparent change in plans for the area (see Section V of this memorandum). In this case, we would recommend that particular care be devoted to obtaining all the relevant facts. In addition to the information suggested above, in this case it would also be desirable to find out when the local plans for the hospital became known and when they became firm, what the need for the hospital is, and whether there are alternative sites. It is possible that approval should only be granted upon condition of repayment to HUD of the fair market value of the properties when transferred to the locality (as a penalty for poor performance) and also conditioned upon improved program performance in the future. The appropriate sanction for violation of conditions such as these might well be program termination. However, in view of the uncertain state of existing regulations, such condition might not be enforceable. Because of these potential difficulties, we would recommend that this case be reserved to Central Office for final decision.

As is clear from the foregoing discussion, the approach recommended is a flexible, programmatic one. Under appropriately drafted regulations, it should be possible to require localities to document their files with the necessary factual evidence and to make certain findings and thereafter to demolish or make non-homesteading use of Section 810 properties without specific HUD approval, although this may not be true for all cases of this nature, and particularly those such as the third example above. The experience gained under the suggested interim procedure may assist in the development of regulations. Necessarily, the foregoing discussion was limited to only a few of the possible situations that may arise where homesteading proves infeasible. We are available to advise you further with respect to such cases when they arise, or to advise you more specifically concerning the three examples you cited when more facts are available.

V. Additional Considerations where Section 810 Property has been Conditionally Conveyed to a Homesteader.

The foregoing discussion has been primarily directed to the situation in which a conditional conveyance and a homesteader agreement, as described in 24 CFR 590.7(b)(2) and (3) (hereinafter referred to as "homesteader documents"), have not yet become effective between the local homesteading agency and the homesteader. Where homesteader documents are in effect with respect to Section 810 property, the statutory interpretations discussed above still apply but their specific application must be analyzed in light of the differing circumstances, and there are additional considerations related to the rights of the homesteader pursuant to Federal and State law under his documents.

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As to the rights of the homesteader under Federal law, we think Section 810 itself implies that after a Section 810 property has been conditionally conveyed to a homesteader, the homesteader should have the right to complete the repair and occupancy of that property pursuant to his homesteader documents, unless he is found to be in material breach of those documents (see Section 810(b)(1), (3) and (4)). Also, when the statute uses the term "conditional conveyance," we think this means that the homesteader should have a real property interest under State law in the specific property "conditionally conveyed" to the homesteader, subject to divestiture only if he materially breaches his obligation under his documents. Such an interest would, we assume, entitle the homesteader to some sort of compensation under State law if the locality wishes to divest the homesteader of his interest, either by negotiation and voluntary acquisition, or by exercise of eminent domain. The situation is analogous to the treatment of an installment land sales contract purchaser as the equivalent of an "owner" of real property under the relocation regulations (see 24 CFR 42.73(c)). Furthermore, the Congressional authorization of Section 312 loans in connection with urban homestead programs (Section 116(e) of the Housing and Community Development Act of 1974) is further evidence that Congress thought of homesteaders as the equivalent of "owners."

However, Section 810 itself does not specify the precise nature of the interest in real property, or the amount of compensation to which the homesteader would be entitled, leaving those details of program administratior for HUD and localities to work out consistent with State law. In Section 590.7(b)(2) and (3) and 590.11(b)(3) of the homesteading regulations, HUD has in turn left these matters to localities participating in the program, by making them responsible for providing their own forms of homesteader documents. Therefore, beyond his general entitlement to a conditional conveyance under Section 810 (and a State law interest in real property thereunder), a homesteader's specific legal rights in the event of a locality's attempt to acquire his homestead property for another use will be controlled by the terms and conditions of his homesteader documents interpreted in light of State law. In this connection, neither Section 810 nor 24 CFR Part 590 confers any greater rights upon a homesteader in relation to the property than an owner of a similar interest in real property would have under State law.

As noted above, the statutory interpretations arrived at in the preceding discussion generally apply to cases in which localities have conditionally conveyed Section 810 properties to homesteaders, but their specific application requires discussion in light of different circumstances. If a homesteader is in material breach of his homesteader documents, the locality can (and in fact should) revoke the conditional conveyance. After revocation, although the homesteader's rights as to the property are terminated, the program relationship between HUD and the locality is affected by the fact that the locality did secure a homesteader. This fact alone will normally be substantial evidence of the good faith of the locality in selecting the property and tends to show that homesteading the property was feasible when the property was selected; it does not conclusively establish that homesteading is not feasible (primarily because the condition of the property is likely to have changed), and it does not relieve the locality of its Section 810 duty to secure a homesteader if homesteading the property remains feasible. Therefore, if the locality wishes to use the property for other purposes, it should submit a request to amend its urban homestead program containing the information described in Section IV above (as of the date of the amendment request), and also indicating that the property has been homesteaded once, the extent to which the property was damaged or improved (if at all) by the homesteader, the nature of the rehabilitation financing the homesteader had, and describing its process of selecting and evaluating the homesteader and of overseeing the homesteader's rehabilitation program. In reviewing this request, HUD should consider the factors discussed in Section IV, as well as whether the locality's procedures in selecting, evaluating, and overseeing homesteaders are adequate or require corrective measures. If the homesteader had a Section 312 loan, HUD may also consider whether there are adequate arrangements to repay the loan in reviewing such request.

If the homesteader is not in material breach of his homesteading documents, the locality must deal with the homesteader and his property interest pursuant to State law, and its ability to do so fairly may be considered by HUD in its evaluation of local performance. In addition, in a case such as this, the only basis for finding homesteading "infeasible," in the programmatic sense we have been using the term, is a higher priority local need for the property for another purpose consistent with local planning, including the "coordinated approach to neighborhood improvement." If there is such a need and the homesteader's interest can be acquired by the locality, an amendment to the local homesteading program could be approved to permit the alternative use, but the locality's performance in cases such as this should be carefully analyzed to determine whether corrective sanctions are warranted. The considerations as to such sanctions are similar to those discussed in the penultimate paragraph of Section IV above. Finally, in a case involving acquisition of a homesteader's interest by a locality, the proposed amendment to the local homesteading program should be accompanied by copies of the homesteader documents and an opinion of counsel to the homesteading agency certifying that the homesteader's rights pursuant to his homesteading documents under State law have been observed. In connection with HUD's review of the request, Area Counsel should review this opinion and the accompanying documents from the standpoint of both its validity in the particular case and also as to whether the locally-developed documents meet the intent and requirements of Section 810 and 24 CFR Part 590.

VI. Authority within HUD to Approve Amendments to Local Urban Homesteading Program.

The secretarial delegations of authority for the urban homesteading program, published at 43 F.R. 6166 (Feb. 13, 1978), delegate to the Assistant Secretary for Community Planning and Development the power and authority of the Secretary under paragraphs (b), (c), (d), and (e) of Section 810. The Assistant Secretary for Housing is delegated the power and authority of the Secretary under paragraphs (a), (f), and (g) of Section 810. Since the power to approve local urban homesteading programs falls under paragraph (b) of the statute, so does the power to approve amendments to such programs; therefore, such power is within the delegation to the Assistant Secretary for Community Planning and Development.

The Assistant Secretary for Community Planning and Development, as authorized by paragraph C. of the secretarial delegation, has redelegated his power and authority pursuant to paragraph (b) of Section 810 to Regional Administrators and Area Managers (the latter subject to suspension by Regional Administrators), with certain exceptions (43 F.R. 23700, May 31, 1978). Among the exceptions are the authority to redelegate and the authority to waive any requirement of the urban homesteading regulations. The authority to approve amendments to local urban homesteading programs is implied from the urban homesteading regulations; it does not amount to a waiver thereof. Therefore, Regional Administrators and Area Managers are authorized to approve amendments to local urban homesteading programs, but they are not authorized to redelegate their authority.

However, in view of the fact that approval of amendments to local homesteading programs will be a new function for Field Offices and there is a complete lack of guidance in existing regulations and other program materials, we strongly recommend that no such decisions be made in the Field until at least a memorandum or Notice to Area Managers and Regional Administrators is dispatched providing adequate instructions. As noted above, we would appreciate the opportunity to concur in that memorandum.

SEP 26 1979

Milton J. Francis, Acting Deputy Assistant Secretary
for Single Family Housing and
Mortgagee Activities, HS
GUB

Robert S. Kenison, Urban Development Division, GU

Use of Section 312 Revolving Fund for Repair of Nonacquired
Property: Section 312 Loan, Esther L. Harris
Richmond, Virginia, No. 51/R-58/165/2

As I indicated at the September 7 monthly meeting of General Counsel Designate McGrew and Assistant Secretary Simons, the attached unsigned memorandum concerning the subject was referred to Mr. Hollister for concurrence and was, in turn, referred to us.

The primary legal issue involved is the permissibility of expenditures from the section 312 revolving fund for repair of nonacquired properties which are security for section 312 loans. It is our opinion that such expenditures may legally be made by HUD where the officials having delegated authority for loan servicing determine that such expenditures are reasonably required or desirable to preserve or protect the Government's financial interest in its security property and there is no other source for payment (including the borrower). Implementing that principle, paragraph 10 of the Section 312 Guide Form Mortgage provides the explicit authority (as between the parties thereto) noted in your memorandum for the Secretary (as Mortgagee) to make such repairs to the security property as he determines necessary and to pay for such repairs. This provision, and other provisions in the mortgage permitting the Secretary to expend funds for specific purposes with respect to the property subject to the mortgage (see paragraphs 2, 6.a., 9, and 12 of HUD-6238), are intended for use in connection with nonacquired security; provisions in a mortgage are generally inapplicable after a property subject thereto has been acquired by the mortgagee.

Our opinion is based upon interpretation of section 312 and section 402 of the Housing Act of 1950, a portion of the college housing program legislation which is made applicable to section 312 loans by section 312(e). Although sections 402(c)(4), (5) and (7) expressly authorize the Secretary to deal with, make payments in lieu of taxes on, and obtain insurance with respect to acquired properties, we view these provisions as permissive, not restrictive. They are necessary because without them the Federal Property and Administrative Services Act of 1949 would limit the Secretary's authority to deal with Government-owned property; however, such provisions do not imply that the Secretary is not authorized to deal with a nonacquired property in a proper case. The Secretary's authority to insert nonacquired property provisions in the section 312 mortgage and the implied authority to act thereon is derived from sections 402(c)(9), 312(c)(1), and 312(g), which broadly authorize HUD to include such covenants and conditions in the section 312 loan documents as the Secretary deems necessary or desirable. In the area of loan servicing and recovery on security, the guiding principle of necessity or desirability is protection of the financial interests of the Government. The desirability of mortgage provisions giving the lender the right to act to protect nonacquired security is shown by the fact that such provisions are often, even typically, included in security instruments by private lenders. Provisions authorizing certain expenditures with respect to nonacquired property are also included in security documents for the section 202 housing for the elderly, college housing, and FHA programs. The college housing and housing for the elderly program provisions are based upon the authority of section 402(c)(9) cited above.

With specific reference to the expenditure of Government funds for the protection of the Government's financial interest in section 312 nonacquired security, it is our opinion that such authority is included in section 312(d), which provides in pertinent part that:

> "There is authorized to be appropriated [certain amounts] . . . which shall constitute a revolving fund to be used by the Secretary in carrying out this section. All moneys in such revolving fund shall be available for necessary expenses of servicing loans made pursuant to this section . . . ."

Very simply, we think the first sentence quoted means that to the extent section 312 authorizes an action by the Secretary, the action shall be paid for from the revolving fund. The second sentence quoted was added in 1965; the legislative history (see Conference Report 89-679, p. 68; Senate Report 89-378, p. 36), states that this amendment was to make clear that moneys in the revolving fund could be used for necessary expenses of servicing loans, including expenses incurred by FNMA and other agencies. Whether expenditures determined necessary with respect to nonacquired property are considered "necessary servicing expenses" or simply expenditures by the Secretary in carrying out section 312, we think it clear that they fall within the broad authorization of section 312(d). We also understand that expenditures with respect to nonacquired property have been made in connection with Secretary-held mortgages under FHA programs and (at least as to the payment of taxes and insurance) under similarly general authority under the section 202 and college housing programs.

With respect to the specific case discussed in the attached correspondence, it is not clear whether there is still a live issue. Apparently, there was a June 15 deadline on getting back to a contractor with regard to a $7,732.00 expenditure, which deadline expired before we received the attached correspondence. If the issue is not moot, however, we think your office ought to obtain more facts than are apparent from the attached package before recommending the expenditure. Expenditures for repairs to nonacquired properties are not permissible under all circumstances, and the attached materials provide no justification for the expenditure, other than citing the provision in the Section 312 mortgage, which merely indicates that these expenditures may be made at the mortgagee's discretion vis-a-vis the mortgagor. However, as a matter internal to HUD, there should be an administrative record establishing that the repair is estimated to be financially beneficial to the Government and that there is no other source for payment. This record should include such considerations as the value of the security property (beyond any prior liens thereon) in relation to the cost of the proposed repair; the availability of insurance or other proceeds to finance any necessary repairs; and the borrower's documented inability to afford the repairs or his unwillingness (after demand) to pay for them. Your determination of estimated financial benefit should conclude that there is a reasonable prospect for repayment of the original loan plus the repair advance or that the advance at least is expected to minimize the Secretary's probable loss on the property. In addition, since the mortgage is not completely clear on this point, the borrower should execute an agreement to add the amount of the advance to the secured loan. If such an agreement cannot be obtained, you should consider recommending foreclosure.

If you or the Office of Finance and Accounting require further legal advice after obtaining additional information with respect to this case, please let us know.

Robert S. Kenison

Associate General Counsel

OCT 12 1979

Joseph M. Hamblin, Area Counsel, 9.3S
San Francisco Area Office

GUB

Robert S. Kenison, Urban Development Division, GU

Section 312 Loans to Rehabilitate Houseboats in Marin County

This is to provide advice on the subject as requested from Mr. Wingard of this office by Mr. Sutton and Ms. King by telephone, most recently during Mr. Ronald F. Halpern's CPD monitoring trip to San Francisco. The advice concerns the legality of the Area Office's proceeding to make loans on houseboats in Marin County as discussed in Assistant Secretary Embry's memorandum of May 23, 1978, to Mr. Dennis T. Rice, a member of the Marin County Board of Supervisors, copy attached.

While section 312 undoubtedly was drafted in anticipation of loans being made to rehabilitate traditional housing (real property), section 312(a) generally authorizes "loans as herein provided to the owners . . . of property to finance the rehabilitation of such property." This "property" is variously referred to elsewhere in section 312 as "residential property," "dwelling units," "structures," "multifamily property," or "nonresidential property," but nowhere is it specifically described as "real property," nor are "personal property" or "houseboats" specifically excluded from the classes of property eligible for loans. Therefore, there is room for statutory interpretation, and it is our opinion that section 312 loans may be made on personal property such as houseboats where they are substantial enough and similar enough to traditional houses to qualify as "residential property," "structures" and "dwelling units" (i.e., they must be so constructed as to be suitable as permanent places of human abode), where they are governed by building codes providing reasonable guidance as to construction or rehabilitation standards, as in the Marin County case, and where they meet all other statutory program eligibility criteria, such as the rehabilitation being part of an approved CDBG program. In this case, such an interpretation is consistent with traditional purposes of the section 312 program, both as a rehabilitation financing tool supporting local CDBG programs and as an aid in avoiding displacement of persons affected by local code enforcement efforts.

Conditions 1-7 of Mr. Embry's May 23, 1978, memorandum should be understood as waivers, explanations or adaptations of outstanding policy to the instant situation; on matters on which there is no waiver, explanation or modification offered, in our opinion the Area Office should consider the existing Handbook and other instructions as remaining in effect with respect to these loans. By way of clarification of numbered paragraph 1 of Mr. Embry's memorandum, a UCC security agreement and financing statement sufficient to perfect under California law a security interest in a houseboat subject to a loan will be sufficient to secure the section 312 loan. However, unless such provisions are clearly unenforceable under California law, the security agreement should include rights and powers for the Secretary as secured party similar in substance to those contained in paragraphs 3 through 21 of Guide Form Mortgage HUD-6238 (3-67), except for loans under $10,000, which may be secured by a security agreement containing provisions similar in substance only to paragraphs 3, 6 and 11 of such Guide Form. If arguably enforceable provisions such as these cannot be incorporated in such security agreements under California law, please let us know, since Mr. Embry may wish to reconsider his position. With respect to paragraph 3 of Mr. Embry's memorandum, we agree with Mr. Sutton's suggestion to the effect that registration of the Secretary's interest in these houseboats in the California records of boat ownership will be sufficient protection against the "mobile security" problem. Finally, with respect to paragraph 5 of Mr. Embry's memorandum, we do not believe that work on a boat's engine is eligible for section 312 financing, since this is not related to the use of the "structure" as a place of permanent human habitation.

We suggest that, when these loans are transmitted to the servicer, a letter explaining the unusual nature of the loan documentation and security property be included.

Since Mr. Embry's memorandum only deals with section 312 loans on houseboats in Marin County and the section 312 Handbook does not generally authorize loans on houseboats, new authorization will be required to permit the making of section 312 loans on houseboats elsewhere.

If you need any further advice or assistance in connection with this matter, please let us know.

Robert S. Kenison
Associate General Counsel

Attachment

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

23 MAY 1978

OFFICE OF THE ASSISTANT SECRETARY
FOR COMMUNITY PLANNING AND DEVELOPMENT

IN REPLY REFER TO:

Mr. Denis T. Rice
Supervisor 3rd District
Administration Building
San Rafael, California 94903

Dear Mr. Rice:

This is in further response to the various communications regarding the use of Section 312 funds to finance the rehabilitation of marine housing, or floating houses, as they are sometimes referred to, in Marin County, California.

We understand that a large part of this housing is constructed on barges left over from World War II and that the dwellings built on them contain many housing code violations which require correction. The policy discussed below addresses that type of situation.

In our letter of March 31, 1978, we noted that you had indicated a willingness to make local CDBG funds available for this purpose. After further discussion here, we propose to allow the use of Section 312 for this type of rehabilitation if the community shares in the risk by financing 50 percent of the cost of rehabilitation. That is, Section 312 would finance half of the cases (based on loan amount) and the community would finance the other half under its CDBG financed rehabilitation loan program. The costs would not be shared on an individual case basis (i.e., half of the cost of an individual case financed with Section 312 and half financed with local funds) thus avoiding some of the technical problems that arise from such an arrangement.

The total Section 312 funds that will be available to you, however, shall not exceed that amount which would normally be expected to be available, taking into consideration our funding and operating policies at the time and the availability of funds.

In large part, we are allowing the use of these funds because you have indicated the loan recipients will be low-to-moderate income homeowners. Therefore, priority must be given to these individuals. The Department further reserves the right to deny loans to individuals with high incomes. We also reserve the right to deny financing for any unit which may be considered luxury property such as a yacht or expensive houseboat.

Some additional procedures will be necessary in order to use the loans for this purpose. These are as follows:

1. Security. All loans on floating homes regardless of amount, should be secured by a chattel-type mortgage and recorded as applicable under local law. The HUD Regional Office, through the Office of Regional Counsel, shall develop an acceptable form of chattel mortage to meet the requirements of local law, and incorporate, to the extent possible, all those items now carried in the standard real estate mortgage used for Section 312 loans in your area.

2. Hazard Insurance. The loan applicants shall be required to purchase and maintain hazard insurance in a manner and amount as considered by the Region to be appropriate to protect the Government's interest in the security.

3. Mobility of Security. Since these units are highly mobile by nature, a clause must be developed for inclusion in the mortgage which requires the owner to notify HUD, or its agent, if the security is to be moved to a different location, or suffer default of the loan if such notice is not given. We understand that this will not cause an unnecessary hardship on the owners since, in the case of Marin County, the units are seldom moved and are occupied the year round by the owners.

4. Occupancy. The floating homes must be occupied by the owner as a permanent residence or rented to a permanent resident.

5. Eligible Rehabilitation Work. Work to correct the code violations and the appropriate amount of general property improvements on the floating unit itself would be eligible. Utility hook-ups from service connections would fall within this definition; however, when extended service lines are required, which would be in the nature of slip or dock improvements, such additional costs may not be included in the loan. Work to keep the unit afloat would be eligible, but extensive repair of such items as a marine engine or outboard motor should be reviewed carefully to determine if the work is necessary to protect the security.

6. Appraisals. Since HUD does not have the capability of appraising this type of property, appraisals shall be secured by the locality through local appraisers qualified to do this type of work. The cost of the appraisal may not be included in the loan amount, in accordance with our Notice CPD 78-5 on program simplification. The appraisals must include an estimate of remaining economic life in order to determine the maximum term of the loan.

7. Refinancing. Since, by nature of the security, this type of loan will be risky, we should limit our coverage to the cost of rehabilitation as indicated in item 5 above, therefore, refinancing will not be permitted.

Would you please let us know if this proposal is acceptable to Marin County?

Sincerely,

Robert C Embry Jr

Robert C. Embry, Jr.
Assistant Secretary

AUG 30 1979

Trudy P. McPall, Acting Director
Office of Community Planning
and Program Coordination, CGP
GUB

Robert S. Kenison, Urban Development Division, GU

Waiver of Comprehensive Planning Assistance (701) Project
Inspection Fee

At your request we reexamined the issue of whether HUD has the authority to waive the 701 project inspection fee and, if not, what actions are necessary to eliminate the fee requirement. As you indicated, OGC concluded in 1977 that the Independent Offices Appropriation Act, 1964 (P.L. 88-215) mandated the collection of inspection fees from 701 grantees not only for FY 1964 but for all years thereafter. Our current reexamination of relevant statutes supports the 1977 OGC conclusion. Since the fees are statutorily mandated, they cannot be waived, and elimination of the requirement would necessitate legislative action.

As discussed in the attached 1977 legal memorandum, the 1964 Appropriations Act (P.L. 88-215), required the mandatory payment "hereafter" of fixed fees by 701 and other HUD grantees which in the aggregate was to cover the expenses of inspection. Legislative history clearly indicates a Congressional intent to make the inspection fees permanent.

The 1970 Department Act (P.L. 91-609), revised section 7 of the original 1965 Department of Housing and Urban Development Act (P.L. 89-174), to provide four additional subsections dealing with the general administrative powers for the Secretary of HUD. Subsection J of section 7, as revised, grants discretionary authority to the Secretary to establish fees and charges against program beneficiaries and project participants to cover, in the long run, certain nonadministrative costs including the costs of inspections as follows:

> "(J) Notwithstanding any other provision of law the Secretary is authorized to establish fees and charges, chargeable against program beneficiaries and project participants, which shall be adequate to cover over the long run, costs of inspection, project review and financing service, audit by Federal or Federally authorized auditors, and other beneficial rights, privileges, licenses, and services. Such fees and charges heretofore or hereafter collected shall be considered nonadministrative and shall remain available for operating expenses of the Department in providing similar services on a consolidated basis."

It is not clear as to whether a court would find that the 1970 Department Act revisions superseded the 1964 Appropriations Act provisions for inspection fees or that the two statutes should be interpreted as complementary and consistent with each other. No light is shed on the Congressional intent relating to inspection fees by the Committee or Conference reports on H.R. 19436 which became P.L. 91-609. For example, the 1964 Act could be interpreted as requiring mandatory inspection fees and the 1970 Act as permitting the commingling of those fees with other fees and charges to cover the Departmental expenses in providing similar services on a consolidated basis. On the other hand, the phrase "Notwithstanding any other provision of law" may be interpreted to mean that Congress wished to grant the Secretary total discretion to establish fees, or not, combined with discretion to use the funds collected to finance a variety of Departmental services to HUD grantees, program beneficiaries and project participants. If a court thus found that the 1970 Act provisions in effect superseded the 1964 Act with respect to inspection fees, the fact that the authority in the 1970 Act is discretionary would mean that the Secretary could exempt, waive or impose inspection fees for 701 grants in whole or in part.

In general, courts are reluctant to determine that a subsequent statute repeals a mandatory provision in a previous statute by implication. In the absence of clear language expressly repealing a prior statutory requirement, courts are more likely to seek an interpretation consistent with both statutes.

It would be unusual for a court to interpret the phrase "Notwithstanding any other provision of law" in Subsection J to mean that Congress intended to supersede the statutorily mandated fixed fee with a fee to be imposed at the Secretary's discretion. Usually courts seek a construction that substantively harmonizes both statutes, in the absence of clear language in the later statute or legislative history documenting an intention to repeal the prior statutory requirement. The House Committee report on H.R. 19436 which became P.L. 91-609, merely noted that the authority to establish fees was included among the Secretary's administrative powers. Codification rather than repeal appears to be the principal Congressional objective of the 1970 Act. Thus, the 1964 Act requires mandatory inspection fees and the 1970 Act permits the commingling of those fees with other charges to cover Departmental expenses in providing similar services on a consolidated basis.

Robert S. Kenison

Associate General Counsel

OCT 19 1979

Trudy P. McFall, Acting Director
Office of Community Planning
and Program Coordination, CG

GUB

Robert S. Kenison, Urban Development Division, GU

Request for Legal Opinion on Eligibility of Special Districts to
Receive Comprehensive Planning Assistance (701) Program Grants

This is in reply to your request for an opinion whether the Midway Community Services District and the South Dos Palos County Water District can be funded either as applicants through the State of California pursuant to section 701(a)(1) of the Housing Act of 1954, as amended, or as applicants with "special needs" pursuant to section 701(a)(7) of the Act.

We have reviewed the letter of August 22, 1979, from the Community Planner in the San Francisco Area Office to the Chairman of Midway Community Services District and agree with her advice that the Districts are ineligible applicants.

Because the Districts are not cities, municipalities, or counties, they are not eligible for pass-through grants from the State of California pursuant to section 701(a)(1). In order to establish eligibility under section 701(a)(7) and the implementing regulation (24 CFR § 600.50), the Districts must be governmental units or agencies with special planning needs related to the purpose of section 701, which cannot otherwise be adequately met. Whether these Districts are "governmental" bodies was not addressed by the Area Office, and there is insufficient information for us to make a determination. However, even if we were to assume that this threshold requirement were met, the Districts would not be eligible applicants in this situation. A critical consideration is whether the statutory requirement that the special planning needs "cannot otherwise be adequately met" exists. We understand that the planning agency for the area, Merced County Association of Governments (MCAG), is a 701 grant recipient and is willing to do a community plan for the Midway/South Dos Palos areas using local assistance funds awarded to it by the State of California. Further, MCAG has a record of satisfactory performance with respect to the planning it has undertaken with 701 funds. Accordingly, we agree with the Area Office Community Planner that because the special planning needs of the Districts can be adequately met by MCAG, they cannot be funded pursuant to section 701(a)(7).

Robert S Kenison

AUG 1 1979

Irving Statman, Area Manager, 6.1S
Dallas Area Office

GUB

Robert S. Kenison, Urban Development Division, GU

Relocation - Section 8 New Construction - Odessa, Texas

This will respond to your memorandum of June 22, 1979, and is in furtherance of several telephone conversations between John Davis, Area Office, CPD, James Ellis of the Office of Area Counsel, and David Polatsek of my staff.

At issue is the applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to a business concern to be acquired and displaced in connection with the section 8 new construction project being carried out in Odessa, Texas. As we understand the situation, a private developer, which originally submitted the proposal for this project to the Public Housing Agency, intends to acquire the property in question, and to convey it to a nonprofit corporation, established for the purpose. The nonprofit will, in turn, convey to the PHA by deed of gift. The business in question might move following acquisition by the private developer, by the nonprofit, or by the PHA. You have asked whether the Uniform Relocation Act applies to this transaction, and have suggested that because program regulations appearing at 24 CFR Part 880 permit a nonprofit to be considered an "instrumentality" of a PHA, the acquisition and displacement of the business by the nonprofit should be declared subject to the statute.

As you have noted in your memorandum, the question is governed by the language and legislative history of the Uniform Relocation Act, and by this Department's implementing regulations, appearing at 24 CFR Part 42. Notwithstanding the fact that a private entity may be eligible to receive Federal financial assistance, the applicability of the Uniform Relocation Act is to be assessed solely within the confines of the statute itself, its history, court decisions clarifying the intent of the Congress and the cited regulations. Based upon our study of these elements, we must conclude that the Uniform Relocation Act applies if, and only if, the PHA acquires the property and displaces the business in question.

The law defines a "displaced person," entitled to relocation benefits, in section 101(6), as:

READEX FICHE best copy available

> "any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . ."

House Committee Report No. 91-1656, which accompanied the final version of the legislation, makes it abundantly clear as to what is meant by "Federal financial assistance," declaring, at page 4, that it covers a program or project ". . . undertaken by a Federal agency, or by a State agency with Federal financial assistance . . . ." (Emphasis added.) The term "State agency" is itself defined in section 101(3) of the law to include any Department, agency or instrumentality of a State, or of a political subdivision of a State. The fact that a Federal program permits a private nonprofit corporation to be considered an instrumentality of a PHA for program purposes, does not, of itself, constitute such a corporation a State agency. It has become apparent in a number of recently decided cases that courts construe this definition to cover only governmental units.

The Supreme Court, in a footnote to its opinion in Alexander v. U. S. Department of Housing and Urban Development, cites the fact that lower Federal courts have construed "Federal financial assistance . . . to include only federally-assisted 'programs or projects' undertaken by agencies of state and local governments, as opposed to private parties." Citing Moorer v. U. S. Department of Housing and Urban Development, 561 F. 2d 175 (CA 8 1977), cert. denied, 436 U. S. 919 (1978); Dawson v. U. S. Department of Housing and Urban Development, 428 F. Supp. 328, N. D. Georgia, 1976, aff'd (CA 5 1978); Parlane Sportswear Co. v. Weinberger, 381 F. Supp. 410 (Mass. 1974), aff'd, 513 F. 2d 835, 837 (CAL, 1975) cert. denied, 423 U. S. 925 (1975). See also Ruby Young, et al. v. Harris, et al., U.S.D.C., E. D. Missouri, CA No. 78-1202-C-1 (1979).

In the Moorer decision, the United States Court of Appeals for the Eighth Circuit stated:

> ". . . we conclude the appropriate inquiry in determining whether URA benefits attach in this case is: Was the real property acquired by a governmental entity with the power of eminent domain. The focus is not on the degree of involvement by a federal or state agency, or a program of such agency, but is instead on whether the person involved was displaced by governmental action either acquiring the property or issuing an order to vacate the property . . . ." (Emphasis added.)

It was for the same reasons which prompted these decisions that the Department added a proviso to the regulation appearing at 24 CFR § 42.55(d)(3), which states: ". . . eligibility under the regulations in this Part shall be limited to cases in which a public housing agency itself acquires real property from which such person is displaced." (Emphasis added.) Similarly, new regulations recently promulgated at 44 F. R. 30946, May 29, 1979, provide at § 42.49 that a displaced person is one who moves as a result of the State agency's acquisition of real property. "State agency" is elsewhere defined exactly as in the statute.

In light of the foregoing, we must conclude that only if the business in question moves following the transfer of title to the PHA will it be eligible for the benefits available under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Robert S. Kenison

Associate General Counsel

AUG 16 1979

MEMORANDUM FOR: Lawrence B. Simons, Assistant Secretary
for Housing-Federal Housing Commissioner

SUBJECT: Relocation - Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 - Definition of Displaced Person

In Mr. Baruch's memorandum of March 22, 1979, several questions were presented regarding the Department's interpretation of the extent of eligibility for relocation assistance and benefits pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (hereinafter referred to as the Uniform Relocation Act). After thorough consideration of the issues which have been raised, we wish to respond at length in two important areas of concern.

Overview

Mr. Baruch has requested a review of this office's prior position that title II of the Uniform Relocation Act, providing for relocation assistance and benefits to displaced persons, is applicable to owner-occupants voluntarily offering their properties for sale to a public housing agency, either in response to an invitation to buy or to a solicitation for offers, or as a result of the desires and initiatives of the owners, themselves. We have concluded that the statute and its legislative history indicate that it was the intent of Congress that this law apply when properties are sold to federally-assisted State agencies, and their owners thereby displaced, even absent a coercive taking accomplished with the use or the threat of the use of the power of eminent domain.

The March 22 memorandum also asks that an OGC opinion, reflected in the Departmental relocation regulations, be reconsidered. This opinion holds that title II applies to owner-occupants who sell their properties to prospective or designated turnkey developers, who are private individuals, rather than State agencies. In light of our experience with the Uniform Relocation Act and the decisions rendered by two Federal Circuit Courts of Appeal since this opinion was adopted, we now agree that the position must be reversed, as it is out of keeping with the law as we understand it. A detailed analysis follows.

Legal Analysis

1. The Applicability of Title II to Negotiated or Voluntarily Undertaken Purchases and Sales.

Since the passage of the Uniform Relocation Act, it has been the position of the Department of Housing and Urban Development, as well as that of other Federal Departments and agencies administering programs of direct land acquisition and displacement or assisting State agencies to accomplish these ends, that the Uniform Relocation Act applies in *any* case in which a Federal agency acquires property and displaces its residents, and in any case in which a federally-assisted State agency acquires and displaces, regardless of the method by which the acquisition is undertaken. The legislative history of the statute and the wording of the law itself allow no other result.

The legislation which became the Uniform Relocation Act grew out of a study conducted by the Select Subcommittee on Real Property Acquisition of the House Public Works Committee dated December 22, 1964. As early as January 30, 1961, Senator Sparkman addressed the Senate, explaining his concept of the study, and stated:

> "This study should be broad enough to cover *all land acquisitions* under Federal and federally-assisted programs, such as highway programs, public works programs, urban renewal programs and military programs. It should be broad enough to cover *all land acquisition no matter how the property is acquired or by whom* . . . . [Emphasis added.]
>
> "The study should be made in the broad spirit of the just compensation provision of the Fifth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. *It should not be limited to a determination of the legal bounds of those provisions or of any particular statute.*" (See page 2.) [Emphasis added.]

In keeping with this sentiment, House Committee Report No. 91-1656, which accompanied the final version of the Uniform Relocation Act and serves to explain its terms, states at page 4:

> "The term 'displaced person' means any person who on or after the effective date of this Act, moves from

> real property or moves his personal property from real property as the result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any other authorized person to vacate such property, for a program or project undertaken by a Federal agency or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the property actually is acquired. [Emphasis added.]

> "It is immaterial whether the real property is acquired before or after the date of the bill or by Federal or State agency, or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or federally-assisted program or project . . . ."

Inasmuch as the Uniform Relocation Act is written in terms of displacement as a result of the acquisition of property for a Federal or federally-assisted program or project, and there is no mention of the method employed in acquisition (whether through condemnation or the threat of condemnation, or on a purely voluntary basis), this office has adhered to the plain meaning of the statute. Section 101(6) of the Uniform Relocation Act defines displaced person as one who moves from real property as a result of the acquisition of such property in whole or in part, or as the result of the written order of the acquiring agency to vacate real property. Since the method of acquisition is nowhere discussed, we believe it is in keeping with the apparent intent of Congress that negotiated purchases and voluntary offerings for sale to a federally-assisted State agency are to be covered by the provisions of title II of the Uniform Relocation Act.

We note that considerable attention is devoted to a revision of the Department's regulations implementing the Uniform Relocation Act's acquisition provisions in the justification accompanying your request for a reconsideration of our opinion. The regulation which appears at 24 CFR § 42.101(a)(1) exempts from the acquisition requirements of the Uniform Relocation Act (appearing at title III) the acquisition of real property which results from a voluntary proposal submitted by the owner in response to a public invitation or solicitation of offer. That exemption is qualified, and applies only in circumstances in which the State agency indicates that it will make no attempt to acquire the property other than by means of a mutually amicable agreement.

Referring once again to House Committee Report No. 91-1656 at page 23, we find the rationale for the policies and provisions of sections 301 and 302, dealing with protections offered the owner who must deal with a Federal agency or a federally-assisted State agency. It is therein stated:

> "Any policy which does not entitle the property owner to an offer of the full amount of the agency's approved value estimate, where the owner must sell is unfair. It is fundamental that all citizens should be dealt with fairly by their Government." [Emphasis added.]

It is on the basis of this legislative history that the Office of General Counsel has been persuaded to modify its earlier position that the requirements of title III apply to properties offered through voluntary proposals submitted by owners in response to public invitations or solicitations for offers. In those cases, owners are not required to sell. No such legislative history exists with regard to the requirements of title II which, as has been indicated, is intended to cover a broad range of acquisition activity, so long as it is conducted by a Federal or State agency for a federally-assisted program or project.

2. The Applicability of Title II of the Uniform Relocation Act to Those Displaced by Turnkey Developers.

Mr. Baruch has requested, additionally, that we review this office's opinion that those displaced in consequence of acquisition by turnkey developers under the public housing program are eligible for relocation assistance and payments. You point out that this position is inconsistent with that taken by the Department in cases involving acquisition by section 8 private developers and those nonprofit entities who acquire property for activities receiving Federal financial assistance pursuant to sections 105(a)(14) and (15) of the Housing and Community Development Act of 1974, as amended, and section 119 of the same statute, establishing assistance to private developers under the Urban Development Action Grant Program.

In the years since the adoption of the Department's relocation regulations published on February 20, 1975, we have had the benefit of several court decisions, clarifying the Uniform Relocation Act, in light of the plain meaning of the statute and a study of its legislative history. The most significant of these decisions was that of the United States Court of Appeals for the Eighth Circuit in Juanita Moorer v. HUD, et al., No. 76-1830 (1977). This case involved an action brought by a group of persons forced to move as a result of the acquisition by a private developer receiving

Federal financial assistance pursuant to section 236 of the National Housing Act, which allows for mortgage insurance and interest subsidies to those providing housing for low- and moderate-income persons. The court held the Uniform Relocation Act inapplicable to these persons stating:

> "We are . . . drawn to the conclusion that the plain statutory language indicates that the URA benefits are available to displaced persons only on projects undertaken by Federal agencies or State agencies receiving Federal financial assistance."

The court cited as a basis for this conclusion the language in sections 207, 208, 210 and 213 of the Uniform Relocation Act, all of which speak in terms of projects undertaken by Federal agencies or State agencies receiving Federal financial assistance. In addition, the court referred extensively to the legislative history of the statute, and particularly made reference to Senate Report No. 91-488. In the Senate hearings on the bill (which later became the Uniform Relocation Act), Senator Muskie stated:

> "Our primary objective in sponsoring S.1 is to establish a uniform policy among Federal agencies and State and local recipients with Federal funds and in their dealings with property owners and others displaced by Federal or federally-aided land acquisitions."

The court went on to point out that several expert witnesses testifying before the House Public Works Committee called attention to the fact that they were concerned that the legislation covered only those displaced by acquisition of land by a State unit for a Federal program. It recalled that subsequent to the enactment of the Uniform Relocation Act a number of attempts were made to extend the law to those displaced by federally-assisted private persons. These efforts reflect the understanding of Congress that such activities are not presently within the scope of the law.

The court went on to cite the fact that displacement at the hands of federally-assisted private persons was held not to be within the scope of the statute in Parlane Sportswear v. Weinberger, 513 F. 2d 835 (1st Cir. 1975), cert. denied 423 U.S. (1975). The court concluded that if relief was to be provided, it must come from the Congress and not the courts.

In recent days, the Eighth Circuit has affirmed an order dissolving a preliminary injunction in a case captioned Ruby Young, et al. v. Harris, et al., No. 78-1896 (8th Cir. 1979). Among other things, the court stated that displacement by a private corporation having the power of eminent domain could not be considered to trigger eligibility under the Uniform Relocation Act, because the entity is not considered a State agency under Missouri law.

Additionally, the United States Court of Appeals for the Fifth Circuit in Peggy Dawson v. HUD, et al., No. 77-1382 (5th Cir. 1979), has affirmed the lower court decision and ruled that those displaced by private entities receiving Federal financial assistance for "Project Rehab" with monies available under section 236 of the National Housing Act are not eligible for relocation payments. The court cited with approval and agreed with the reasoning in the Moorer decision.

This line of cases had led the Office of General Counsel to conclude that the Uniform Relocation Act does not apply in any case in which persons are displaced by acquisition by federally-assisted private entities. Accordingly, we have determined that such eligibility should not be extended to persons displaced by private developers in the section 8 public housing program, in the urban development action grant program, the community development block grant program and the neighborhood strategy area program. Given this position, the current regulation providing that benefits shall be made available to those displaced by private parties acquiring properties for use in the turnkey public housing program is an anomaly.

We have been able to discern no reasonable basis for distinguishing this program from the other cases involving private developers, and we can find nothing in the applicable case law permitting us to make an exception in this case. Accordingly, we agree with the suggestion that the Department's regulation finding eligibility for such displacees must be eliminated.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

Robert C. Embry, Jr., Assistant Secretary
for Community Planning
and Development, C

[illegible] OCT 23 1979

Robert S. Kenison, Urban Development Division, GU

Relocation - Loan Guarantees - Applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to Section 108 of the Housing and Community Development Act of 1974, As Amended

This will reply to your memorandum of September 26, 1979, requesting advice relating to the applicability of acquisition and relocation requirements to the loan guarantee program. We shall respond to the questions in the order of their presentation:

1. Does the Uniform Relocation Act apply to activities funded with proceeds from a loan guaranteed under section 108?

   The Uniform Relocation Act applies to acquisition and displacement for programs and projects receiving Federal financial assistance. Federal financial assistance is defined in section 101(4) of the statute to mean: "A grant, loan, or contribution provided by the United States, except any Federal guarantee or insurance . . . ." (Emphasis added.) Accordingly, the statute is not applicable to acquisition and displacement carried out by a State agency with proceeds from a loan guaranteed pursuant to section 108.

2. Does the Department have the authority administratively to impose rules relating to acquisition and relocation undertaken as the result of activities receiving loan guarantees pursuant to section 108?

   Such requirements can be imposed, in our opinion. For any discretionary loan or grant program, any reasonable requirement is within the Department's power to impose, including those relating to relocation and acquisition. In the case of entitlement community development block grants, where eligibility is vouchsafed by law wherever certain enumerated requirements have been met, the Department is precluded from administratively imposing additional regulatory requirements (such as acquisition and relocation regulations) as a prerequisite to eligibility. Since loan guarantees are awarded on a competitive basis, we believe it is permissible for the Department to establish regulatory acquisition and relocation requirements.

Robert S. Kenison

Associate General Counsel

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Wilson Henderson, lES

DATE: **AUG 14 1979**

IN REPLY REFER TO:

1G

FROM : Marvin H. Lerman

SUBJECT: Compliance Under Section 504 of Rehabilitation Act of 1973 - Waltham Van Transportation Service for Handicapped

This will reply to your memorandum of July 6, 1979 concerning a complaint of denial of equal access by a handicapped person to the use of a van purchased by the City of Waltham under the CDBG program. We understand that the van is used to provide transportation to the handicapped in general, and that it is equipped with a wheelchair lift; however, the complainant has a handicap which requires her to remain in a prone position, thus making her unable to use the van as presently designed. You have asked whether the City of Waltham is or is not in compliance with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 with respect to this activity.

We further understand that under State of Massachusetts ambulance regulations pertaining to vehicle classification for transportation, in the event that the City provided transportation to a person in a prone position, it would have to be done by a Class II ambulance with two trained attendants and certain equipment and supply requirements. The complainant has stated that if her use of the van is precluded by state law, she should be entitled to alternative transportation. The City has apparently not taken action to develop such transportation for cases like the complainant's.

In our opinion, the City is in compliance with Section 504 and is not required under Section 504 to provide alternative transportation to the complainant.

Section 504 provides in pertinent part that

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benfits of, or be subjected to

> discrimination under any program or activity receiving Federal financial assistance . . . (emphasis added).

Section 504 also requires the promulgation of implementing regulation by each federal agency. That requirement was also stated in Executive Order 11914 dated April 28, 1976, which gave the lead authority in implementing Section 504 to H.E.W.

As you know, HUD has not yet published a final rule on Section 504. However, a proposed rule was published at 43 Fed. Reg. 16652 et seq., dated April 19, 1978. Moreover, H.E.W. has published final regulations regarding implementation of Executive Order 11914 which apply to all federal departments extending federal financial assistance. See 25 C.F.R. Part 85.

Under the H.E.W. regulations and the proposed HUD rule, a recipient of federal assistance may not on the basis of handicap deny a "qualified handicapped person" the opportunity to participate in or benefit from the aid, benefit or service (25 C.F.R. 85.51(b)(i) and proposed 24 C.F.R. 8.4(b)(i)). "Qualified handicapped person" is defined in both places to mean, with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services (25 C.F.R. 85.32(b) and proposed 24 C.F.R. 8.3(k)(2), which also includes benefits).

A recent decision by the U.S. Supreme Court in the first case requiring that Court to interpret Section 504 held that "an otherwise qualified" person under the terms of the Act and the HEW regulations is one who is able to meet all of a program's requirements in spite of his or her particular handicap. Southeastern Community College v. Francis Davis, ____ U.S. __, 47 U.S.L.W. 4689 (June 11, 1979) at 4691. That case concerned an individual with a serious hearing disability who was admission to a community college nursing training program because of the college's belief that her disability would make it impossible for her to participate safely in the normal clinical training program or to care safely for patients. The District Court first hearing the case determined that the individual was not an "otherwise qualified handicapped individual" for purposes of Section 504 protection and that her exclusion was not discriminatory within the meaning of Section 504. The Court of Appeals reversed, holding that Section 504 required the college to consider the individual's application without regard to her hearing impairment, and suggesting further that Section 504 required affirmative conduct by the college to modify its program to accommodate the disabilities of such applicants. On appeal, the U.S. Supreme Court reversed, finding no violation of Section 504. The Court's opinion stated that while mere possession of a particular handicap is not a permissible grounds for exclusion, that did not mean that a person need not meet legitimate and reasonable physical requirements in order to be "otherwise qualified." In other words, under Section 504, an "otherwise qualified" person is one who is able to meet a program's requirements despite his or her handicap rather than one who is able to a program's requirements in every respect except as to limitations imposed by the handicap.

We feel that the complainant in this situation also does not satisfy the statutory and regulatory requirements of being an "otherwise qualified handicapped individual." Because of the fact that under state ambulatory vehicle requirements, her transportation needs must be met by ambulance with two trained attendants and certain other equipment, she is not an eligible candidate for the Waltham van transportation service. Presumably, the basis for the requirement of an ambulance and trained staff is that such a disability would make it impossible or difficult to be transported with adequate safety through other methods of transportation. Thus, it is not a matter of the complainants's being excluded for the mere possession of her particualr handicap, but rather because she cannot meet a bona fide and reasonable requirement of the service in terms of transportation factors. Since the complainant is not an "otherwise qualified handicapped individual," her exclusion from the service does not violate Section 504.

Given that the complainant is not eligible for the City van transportation service as it is presently designed, the question remains whether the City has any duty to undertake affirmative action to modify that service or to develop alternative means of transportation so as to accommodate needs such as the complainant's. We observe that the purchase of an ambulance and acquisition of the required staff and equipment would be costly and would involve extensive modification of the service now provided by the City. This issue was addressed by the Supreme Court in the Davis case, which held that "neither the language, purpose nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." 47 U.S.L.W. at 4692. The Court noted that Congress had chosen to provide for affirmative efforts to overcome handicap disabilities in sections of the Act other than Section 504 (see Section 501(a) and (b) involving the federal government as employer or government hiring by federal contractors). Although the Court conceded that the distinction will not always be clear between unlawful discrimination and a lawful refusal to extend affirmative action, it found that the college's unwillingness to make major adjustments in its program did not constitute discrimination. In light of that opinion, we feel that Waltham's failure to make major modifications in its van service to accommodate the complainant does not violate Section 504.

In closing, we note that under the section of the proposed HUD rule which would implement Section 504 with respect to the CDBG program, exceptions may be made to the requirement that a recipient administer its CDBG program so that each activity is accessible to handicapped persons "where the recipient can demonstrate that, because of the nature of the activity, the provision of access would be infeasible . . ." (proposed 24 C.F.R. 8.62(b)). Thus, under the proposed rule, a process would be available whereby Waltham could justify its exclusion of the complainant from the van transportation service.

Marvin H. Lerman

Regional Counsel

Jack B. Toll, Regional Counsel, 8G
Region VIII

OCT 18 1979

GUB

Robert S. Kenison, Urban Development Division, GU

Request for Waiver of Anti-Speculation Language in Urban Renewal Redevelopment Contracts

This is in response to your memorandum of April 27, 1979, enclosing a letter from Mr. Paul C. Benedetti, Attorney for the Denver Urban Renewal Authority, requesting permission to modify the required form of HUD-6209 (urban renewal land disposition contract). The language of the proposed modification would allow an urban renewal land redeveloper to sell or lease individual condominium units prior to issuance of a certificate of completion for the entire property, provided that the sale or lease deposits were held by the redeveloper in an escrow account, subject to withdrawal only to reduce the construction loan or to apply directly to construction or marketing expenses.

We are unable to concur in the Denver proposal in its entirety. While we have no objection to the redeveloper pre-selling or leasing part or all of a condominium project prior to issuance of a certificate of completion, accepting deposits on such pre-sales or leases, and depositing such receipts in an escrow account, we do not agree that the funds in the escrow account should be available for use by the redeveloper until he is in a position to convey title to or lease the units in question after issuance of a certificate of completion.

The reason for the latter restriction is that until such lease or conveyance the redeveloper is responsible to the purchasers or the lessees of the units for their deposits. To permit the redeveloper to use these funds for another purpose would mean that if the redeveloper were unable to convey or lease the units as contemplated and had any financial difficulties, the purchasers or lessees might be unable to recover their deposits. Such a result would be detrimental to the interests of the "ultimate consumers" of the property and contrary to HUD policy. For example, FHA Form No. 3279 (Model Form of Subscription and Purchase Agreement for a condominium insured under section 234 of the National Housing Act) provides in section 1, that: "Seller hereby agrees that all sums received on account of the purchase of the family unit shall be held in trust and shall be placed in an escrow account with ________ Bank under an escrow agreement, the terms of which are acceptable to FHA. The escrow agreement shall provide that seller shall not be entitled to receive any sums in the escrow until conveyance of title." A similar provision is also contained in section 205(a)(1) of S. 612, the Administration's proposed condominium consumer protection legislation.

Therefore, the language proposed by Mr. Benedetti is acceptable only if everything after the last comma is deleted and the following is inserted in lieu of the deleted material: "and such funds are either delivered to the Redeveloper at settlement or upon forfeiture by the purchaser, or are returned or otherwise credited to the purchaser."

In addition, we note that sections 307(b) and 503(a)(2) of HUD-6209B are so worded as to permit an LPA to agree with a redeveloper to issue certificates of completion as to individual parts or parcels of the entire property covered by the Land Disposition Agreement. While we do not think that this was intended to authorize certificates of completion for individual condominium units in a building, it would permit the issuance of staged certificates of completion for separate buildings in a condominium complex where in fact such buildings become ready for occupancy at different times. This possibility might also be suggested to the Denver Urban Renewal Agency, if it is relevant to the cases in question and has not been explored.

Assistant Secretary Embry has concurred in this memorandum.

Robert S. Kenison
Associate General Counsel

FINANCE AND ADMINISTRATIVE LAW

5 JUL 1979

Donald G. Dodge, Acting Director, Office of
Policy Planning, CP

Marilyn G. Wagner, Office of General Counsel, GV

Standards of Conduct--Employee in HUD on IPA Assignment:
Application for Rehabilitation Loan

This memorandum responds to your oral inquiry whether Mr. , who will be assuming an Intergovernmental Personnel Act (IPA) assignment in the Office of Policy Planning, CPD, in August, may apply for a rehabilitation loan for his personal residence under the CDBG program. While an individual employed in a federal government agency under an IPA assignment is subject to the agency's conduct regulations, we do not believe that this proposed activity would violate HUD's Standards of Conduct regulations set forth at 24 C.F.R. Part O.

Mr. , currently working at the State University of New York at Albany, bought a three-story town house in Albany, two floors of which he plans to use for his personal residence and the other floor as a rental unit. This residence is located in a Community Development Program area in Albany and may be eligible for a low-interest housing rehabilitation loan, an eligible activity under the CDBG program (§ 105(a)(4) of the Housing and Community Development Act of 1974). Albany, as an entitlement area, receives CDBG funds from HUD based on a strict mathematical formula and makes the final determination for awards of rehabilitation loans.

Section 0.735-204(a)(4) of the HUD's Standards of Conduct regulations prohibits an employee from "activities that establish relationships or property interests that may result in a conflict between his private interests and his official duties." Mr. responsibilities, as set forth in the IPA Assignment Agreement, primarily involve conducting policy analyses and studies within the Office of Policy Planning in CPD and do not involve CDBG rehabilitation loans. Because of the nature of Mr. duties and because HUD does not determine the amount of CDBG funding a community receives nor the disposition of the funds for grants or loans there can be no conflict of interest under that section.

It is our opinion that Mr. participation in the benefits of the rehabilitation program does not establish interests which will conflict with his official duties. His participation in this program merely constitutes engaging in a financial transaction "to the same extent as a private citizen not employed by the Government" which is not prohibited by the Standards of Conduct regulations. Section 0.735-205(d)

If you have any further questions, please contact our office.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative
Law Division

20 JUL 1979

Mr. John M. Longo
American Development and
  Finance Corporation
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

Dear Mr. Longo

This is in reply to your request for an opinion as to whether the conflict of interest laws would prohibit your representing the owner/developer of Shirley Duke Apartments, a project being processed in the Firm Commitment Stage through the D. C. Area Office, in connection with Shirley Duke and future projects in which he may become involved. Prior to the termination of your HUD employment in May, 1979, you were Director of the Multifamily Development Division in the Office of Multifamily Development. Your letter of July 10, 1979 states that neither you nor any member of your staff participated in the processing or decision making involved in the Shirley Duke project, and you have informed Jocelyn Schaffer, an attorney on my staff, that these matters were not under your official responsibility during your employment with HUD.

The criminal conflict of interest statute prohibiting former Government employees from engaging in certain representational activities, 18 U.S.C. § 207, imposes these restrictions only in connection with particular matters that involve specific parties and either were actually pending under the former employee's official responsibility during the last year of that responsibility, or were matters in which the former employee participated personally and substantially. Because the Shirley Duke project was not under your official responsibility and you did not personally and substantially participate in the Department's actions concerning it, the statute does not limit your representation of its owner/developer with respect to the project.

I have enclosed, for your convenience, copies of 18 U.S.C. § 207 and the corresponding HUD regulation. Although the statute was recently amended by the Ethics in Government Act of 1978, the amendments apply only to persons who have left Government service since the Act's effective date, July 1, 1979.

If you have any questions concerning the application of the post employment restrictions to other specific projects, do not hesitate to call upon this office for advice.

Sincerely,

(signed) Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

Enclosure

10 AUG 1979

Mr. Richard K. Berg
Executive Secretary
Administrative Conference
of the United States
2120 L Street, N. W.
Washington, D. C. 20037

Re: Conflict of Interest
in Rule-making

Dear Mr. Berg:

This is in reply to your request for HUD's governing law and policy concerning conflict of interest and disqualification of decision-makers in rule-making and policy determinations.

This Department's policy and procedures for rule-making, set forth at 24 C.F.R. Part 10, (copy enclosed), do not specifically address disqualification of the decision-maker. Under these regulations, rule-making proceedings may be initiated by the Secretary or the officer to whom the Secretary has expressly delegated authority to issue rules. While it therefore is possible that a deciding official could be predisposed to adopt a certain rule, all timely, relevant comments of interested persons must be considered by the decision-maker before a final rule is adopted (24 C.F.R. § 10.16).

24 C.F.R. Part 3282, subparts C and D (copies enclosed) prescribe additional procedures for rule-making and hearings under the National Mobile Home Construction and Safety Standards Act of 1974. These regulations do not specifically address the issues of disqualification or prejudgment by the decision-maker, but they do provide for presentation and consideration of views of any interested person to allow fully informed decision making in these formal or informal proceedings.

In contrast to the Department's regulations concerning rule-making and informal proceedings, those concerning certain adjudicative proceedings specifically provide for disqualification of the decision-maker. In 24 C.F.R. Part 20, which provides regulations concerning HUD's Board of Contract Appeals, § 20.4(e) (copy enclosed) prohibits an Administrative Judge from participating in a decision of the Board if he or she participated in the matter in any manner prior to the time the appeal was filed. Rule 33 of the Board's rules (also enclosed) restricts ex parte communications with members of the Board. 24 C.F.R. § 1720.220 (copy enclosed), which applies to hearings under the Interstate Land Sales Full Disclosure Act, provides for self-disqualification by an administrative law judge on his or her own motion or upon motion of a party. If the motion is denied, the hearing will proceed but the question of due process and fairness may be raised on appeal. Section 1720.215 (also enclosed) addresses ex parte communications with an administrative law judge or appeals officer on the Interstate Land Sales Board. In 24 C.F.R. Part 2, which provides regulations governing practice and procedure for hearings, decisions and administrative review conducted by this Department pursuant to Title VI of the Civil Rights Act of 1964, Subpart K Judicial Standards of Practice, (copy enclosed) discusses improper conduct of and ex parte communications to the presiding officer. Section 2.61 of Subpart G refers to "disqualification . . . of the designated hearing examiner" as an event triggering the designation of another hearing examiner to take his or her place.

This Department's policies concerning the avoidance of conflicts of interest are embodied in several provisions of our Standards of Conduct regulations, 24 C.F.R. Part 0 (copy enclosed). In addition to provisions prohibiting employees from having financial interests that conflict with their Government duties (§ 0.735-205(a)) and, like 18 U.S.C. § 208, from acting in matters in which they, their families, business associates or prospective employers have a financial interest (§ 0.735-205(b)), these regulations also generally address other types of conflict such as prejudgment and bias. Section 0.735-202, for example, provides that:

> An employee shall avoid any action whether or not specifically prohibited by the regulations in this subpart, which might result in, or create the appearance of:
>
> (a) Using public office for private gain;
>
> (b) Giving preferential treatment to any person;
>
> * * *
>
> (d) Losing complete independence or impartiality;
>
> (e) Making a Government decision outside official channels; or
>
> (f) Affecting adversely the confidence of the public in the integrity of the Government.
>
> * * *

> (h) Excluding any person from participating in, or denying to any person the benefits of, any program or activity administered by the Department on the ground of race, color, religion, sex, or national origin. . . .

These regulations also attempt to prevent conflicts by focusing on the avoidance of interests, activities or relationships likely to result in any conflict of interest or in lessening public confidence in the integrity of Government. See, for example, § 0.735-203 Gifts, entertainment, and favors, § 0.735-204 Outside employment and other activity, and § 0.735-205 Financial interests. Disciplinary and remedial actions which may be taken when an employee has violated the Standards of Conduct include changes in assigned duties and disqualification for a particular assignment (§ 0.735-106). The basic principles and specific prohibitions enunciated in HUD's Standards of Conduct apply to every employee in every aspect of his or her Government employment.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

Enclosures

OCT 30 1979

Re: Maintaining position in
law firm partnership
during HUD employment

Dear :

This will confirm and supplement our telephone conversation of October 13, 1979, regarding your desire to remain a partner in your law firm while holding the position of to the Secretary of Housing and Urban Development. By agreement with your partners, you would be an inactive member of the firm during your tenure at HUD and you would not receive any distribution of the partnership earnings during this time. It is also my understanding that the firm does not normally perform any HUD-related work.

Although it is the general policy of the White House to require that noncareer Executive Appointees completely sever their ties with former employers, no law or regulation prohibits you from retaining your law partnership. I must, however, draw your attention to the Federal conflict of interest statutes, HUD Standards of Conduct regulations and Departmental policy which impose certain limitations on your activities as a Government employee and on your law practice.

Federal criminal conflict of interest laws, 18 U.S.C. §§ 201-209, are particularly pertinent where a Government employee is an attorney or has outside activities or financial interests that may entail contact with the Government. Section 209 prohibits an employee from receiving compensation from an outside source as a supplement to his or her Government salary. However, the section specifically exempts from its coverage an employee's continuing participation in "bona fide" employee benefit plans maintained by a former employer. The Department of Justice, which has responsibility for advising agencies with respect to the Federal conflict of interest laws, takes the position that an employee who has resigned, or is on leave of absence from, former employment may continue to participate in such plans at the expense of the former employer only if the plans so provide. We have reviewed the pension plan you sent to us and are satisfied that your continued participation in them is entirely consistent with section 209.

Because assets of the trust established as the funding vehicle for the plan can, under the terms of the plan, be invested in ways prohibited to HUD employees, you should have no direct or indirect contact with the trustee on matters relating to the administration of the trust during your tenure at HUD. You should also be aware that section 202(f) of the Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824, 1841, requires an employee who is required to file a financial disclosure statement to report the holdings and sources of income of a trust in which the employee has a beneficial interest. This information need not be reported with respect to a trust such as this which was not created directly by the employee, the employee's spouse or dependent child if the employee, the spouse and dependent child have no knowledge of the holdings or sources of income of the trust.

Section 205 of Title 18 directly limits a Government employee's outside activities by generally prohibiting the employee from representing a party before any court or agency of the Federal Government and from prosecuting or receiving any gratuity in consideration of assistance in prosecuting a claim against the United States. (This prohibition is personal and does not extend to your firm.) By assuming an inactive role in the firm during your Government employment you will avoid any conflict with the terms of this section.

Section 208 of Title 18 limits a Federal employee's official activities by prohibiting the employee from acting on behalf of the Government in a matter in which an organization in which the employee is a partner or employee, or with which the employee has an arrangement for future employment, has a financial interest. This statute is unlikely to limit your activities as   to the Secretary if the firm continues to have no business with HUD during the period of your employment. If the firm undertakes any HUD-related work during your employment here, this statute would require you to abstain from participating in such matters.

HUD Standards of Conduct regulations, 24 C.F.R. Part 0 (copy enclosed) go further than this, however. These regulations would require you to withdraw from the firm if it were to become involved in HUD-related work. Specifically, section 0.735-204, which limits an employee's outside employment and activities, prohibits "[e]mployment with any person, firm, or other private organization having business either directly or indirectly with the Department." § 0.735-204(a)(8).

Moreover, in order to avoid apparent, as well as actual, conflicts of interest, section 0.735-204 also provides that "[n]o full-time employee or part-time employee with a regularly scheduled tour of duty shall maintain a publicly listed place of business without the prior approval of the appropriate deputy counselor." As the Department's Counselor under the Standards of Conduct system, I concluded that it would conflict or appear to conflict with the full performance of your duties in the highly visible and demanding position of to the Secretary for your name to remain listed on the firm's stationery or in any other public listing or directory while you are employed by HUD. To remain publicly identified with your firm could give the impression that your full energies are not devoted to Government employment. Indeed, it is implicit in this opinion that you could not remain in this partnership at all on anything but an inactive basis.

I hope you will call me if you have any further questions concerning these matters.

Sincerely,

/S/

Jane McGrew
Consultant to the Secretary
General Counsel-Designate

Enclosure

07 NOV 1979

Louise Powell, Secretary
Office of the Secretary

Marilyn G. Wagner, Office of General Counsel

Secretary Landrieu's Participation in President's Council Activities of Loyola University

This responds to your request for an opinion whether Secretary Landrieu may serve without compensation on the President's Council of Loyola University and on the Membership Committee of that Council. In our opinion the Secretary may do so if he refrains from acting, as Secretary, in any matter in which Loyola University has a financial interest.

18 U.S.C. §208 imposes criminal penalties on a Federal employee who

> ...participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, request, or other particular matter in which, to his knowledge, ...[an] organization in which he is serving as officer, director, trustee, partner or employee...has a financial interest...

Although a position on the President's Council may not fall precisely within any of the categories of "officer, director, trustee, partner or employee", to avoid any suggestion of a violation of the statute, the Secretary should not take any action on any HUD matter in which Loyola University has a financial interest.

So long as any actual conflict of interest or appearance of conflict is avoided HUD's Standards of Conduct regulation generally encourage an employee's participation in the affairs of a nonprofit educational institution such as Loyola. 24 C.F.R. §0.735-204(f)(2).

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

DEC 12 1979

Division of Housing
Management and Special
Users Research, TRS

Marilyn G. Wagner, Office of General Counsel

Determination Under 18 U.S.C. §208

This is in response to your memorandum of September 17, 1979, requesting a determination under 18 U.S.C. §208 and 24 C.F.R. §0.735-205(b) that the interest of the University of Michigan (with which you have an arrangement concerning future employment) in a HUD contract is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect you to perform concerning that contract.

You came to HUD in September 1978 as a visiting scholar from the University of Michigan, Institute for Social Research and School of Natural Resources and will soon return there where you have retained the position of tenured researcher. Soon after coming to HUD you became the Government Technical Monitor on the Baltimore Home Maintenance Program Evaluation Study. Part of the data collection for the Study is being performed by the University of Michigan Institute for Social Research under an indefinite quantity contract. You had no involvement in the award of this contract and have no role in the evaluation of the contractor's performance. In your words, "my work with this project has been restricted entirely to substantive research matters of a technical nature".

The contract with the Institute for Social Research represents approximately .001 percent of the research budget of the University of Michigan, with which you have an arrangement for future employment. Because the University of Michigan's financial interest in the matters in which you are participating on behalf of the Department is so nominal (and indeed it appears that your participation in the project could have no effect on that financial interest). I hereby determine that the interest of the University is so insubstantial as not to affect the integrity of the services you have performed concerning that contract. Although 18 U.S.C. §208 requires an advance written determination to this effect, I am advised that Assistant Secretary Shalala, the official responsible for appointing you to your HUD position, was aware of your relationship with the University of Michigan and was aware that you were to be GTM on a contract with that University. Because 18 U.S.C. §208 authorizes the official responsible for your appointment to make the determination that the integrity of your services will not be affected (an authority which the Secretary has also delegated to the General Counsel's Office, 39 Fed. Reg. 31356 (1974)), I consider this opinion to be a written confirmation of Assistant Secretary Shalala's earlier determination and, as such, to meet the requirement of 18 U.S.C. §208 for an advance written determination.

Accordingly, your participation in the contract is not prohibited.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

21 AUG 1979

NOTE TO: James R. Walker
Administrative Officer
Office of the Secretary

Subject: Acceptance of Gifts by HUD Employees

You have asked for a brief outline of the rules applicable to the acceptance of gifts or favors by HUD employees from individuals outside the Department.

HUD's Standards of Conduct regulations at 24 C.F.R. § 0.735-203 set out the basic requirements. In general, no HUD employee, including the Secretary, may accept a gift, gratuity, favor, entertainment or loan of more than nominal monetary value from any person who is doing or may do business with the Department, has interests or activities which are regulated by the Department or may be affected by the Department's activities. The prohibitions are directed primarily against involvement with persons who may have occasion to seek favorable decisions from the Department. However, the regulations specifically permit the acceptance of gifts from relatives or friends or voluntary or unsolicited gifts from employees when it is clear that HUD business is not the motivating factor.

The regulations specifically permit acceptance of promotional and advertising material of nominal value and loans made on customary business terms to finance an employee's usual activities. Acceptance of food or beverages of nominal value in the course of regular business meetings or activities is also specifically permitted. Attendance at receptions given by associations of businesses (e.g., the Homebuilders, MBA, etc.) has been approved by the Office of Government Ethics.

The acceptance of gifts from foreign governments is governed by the Foreign Gifts and Decorations Act. 5 U.S.C. § 7342. All gifts to HUD employees the value of which could exceed $100 in U.S. currency, received here or abroad from a foreign government, should be reported to the HUD Office of International Affairs or an appropriate U.S. Embassy representative as soon as practicable. Gifts from foreign governments valued in excess of $100 may be accepted on behalf of the United States if it would be impolitic to refuse the proffered favor but such favors should be reported to the HUD Office of International Affairs or an appropriate Embassy representative as soon as practicable.

Our office will be happy to provide advice on specific questions that may arise which do not fall within the general guidelines outlined above.

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

AUG 28 1979

MEMORANDUM TO: Donna E. Shalala
Assistant Secretary
Policy Development and Research

SUBJECT : Donations by HUD Employees Toward a Gift for Former Secretary Patricia Roberts Harris

This is in response to your question whether a group of HUD employees may voluntarily make contributions toward a gift for former Secretary Patricia Roberts Harris. It is our opinion that Federal restrictions on gifts to superiors and the corresponding regulations of this Department and the Office of Personnel Management do not prohibit such gifts.

The controlling statute, 5 U.S.C. §7351, provides:

> An employee may not:
>
> (1) solicit a contribution from another employee for a gift to an official superior;
>
> (2) make a donation as a gift to an official superior; or
>
> (3) accept a gift from an employee receiving less pay than himself.
>
> An employee who violates these sections shall be removed from the service.

Regulations issued by the Department of Housing and Urban Development, 24 CFR §0.735-203(c), the Office of Personnel Management, 5 CFR §735.202(d), and the Department of Health, Education, and Welfare, 45 CFR §73.735-303 track the words of the statute and add an exception for nominal gifts. HUD regulations, for example, provide:

> An employee shall not solicit contributions from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. §7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness or retirement.

The reference to "official superior" excludes persons who are not presently superiors of the employees making the donations. Because Ms. Harris is no longer a superior to HUD employees, it is my opinion that employees of this Department may make such donations.

A second question is whether Secretary Harris may accept gifts from HUD employees. In her present position she is subject to the conduct regulations of the Department of Health, Education, and Welfare, which are similar to HUD regulations. 45 CFR §73.735-303 provides:

> . . . An employee in a superior official position
> shall not accept a gift presented as a contribution
> from employees receiving less salary than [herself] . . .

It is not clear whether Secretary Harris qualifies as an "employee in a superior official position" to HUD employees. If "employee" refers to HEW employees rather than to Government employees in general, she would not be in a superior official position to HUD employees. She may wish to obtain an opinion from HEW on this point. Regardless of that restriction a gift to Ms. Harris may fall within the exception for "a voluntary gift of nominal value. . . made on a special occasion such as. . . retirement," 45 CFR §73.735-303 (the same wording as used in HUD regulations), but this too, is a matter for HEW to decide.

Please contact me if you have any additional questions regarding the actions of the HUD employees.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

SEP 25 1979

Henry A. Hubschman, Esq.
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

Dear Mr. Hubschman:

This will confirm oral advice given to you concerning your collection of contributions from current and former HUD employees in order to purchase a painted portrait of former Secretary Patricia Roberts Harris to be hung with portraits of other former Secretaries in the lobby of the HUD building.

Although the Federal Government will no longer pay for painted portraits of Cabinet members to be hung in the buildings housing the Departments they head, it will pay the cost of an enlarged photograph. The authority of agencies to hang more expensive portraits, for which the Government does not pay, is not restricted by this policy. Eliminating any doubt that the Department may accept a portrait of the former Secretary from an outside source, is HUD's statutory authority to accept gifts, found in section 7(k) of the Department of HUD Act, 42 U.S.C. 3535(k).

Employees who wish to contribute money toward the purchase of the portrait need not be concerned that their contribution will violate the Standards of Conduct. The section of these regulations addressing solicitation of contributions and making donations, provides that:

> An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness or retirement.
>
> 24 C.F.R. § 0.735-203(c)

Where the solicitation or donation is not for a gift to an official superior, this restriction does not apply. In this case, the portrait will be a gift to HUD, and not to Secretary Harris. Even were the portrait considered to be a gift to Secretary Harris, contributions from HUD employees toward a gift for her would not be prohibited by this regulation because she is no longer an official superior to HUD employees. In the case of former HUD employees who have transferred to the Department of Health, Education and Welfare, now headed by Secretary Harris, a small donation toward the portrait could be viewed as a "voluntary gift of nominal value . . . made on a special occasion such as . . . retirement" — an exception to the general rule which is also found in the conduct regulations applicable to HEW employees, at 45 C.F.R. § 73.735-303. Although this Office has no authority to interpret HEW regulations, it is my opinion that this exception would apply in the unlikely event that the portrait were considered a gift to Secretary Harris rather than to HUD.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

OCT 29 1979

Mr. Henry Hubschman
Fried, Frank, Harris, Shriver
and Kampelman
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Dear Henry:

This will confirm our telephone conversation concerning the Secretary's acceptance of a gift to the Department consisting of money to be used to pay for a portrait of former Secretary Patricia Roberts Harris.

Section 7(k)(1) of the Department of Housing and Urban Development Act, 42 U.S.C. §3535(k)(1), which authorizes the Secretary to accept gifts of property and services on behalf of the Department, provides that:

> "Gifts and bequests of money and the proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed upon order of the Secretary. Property accepted pursuant to this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest."

Accordingly, your gift to the Department may be made in the form of money to be used to pay for the portrait of Secretary Harris. The money will be disbursed upon order of the Secretary, for the designated purpose. I have, by copy of this letter, so informed Jim Walker.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative
Law Division

JUL 17 1979

MEMORANDUM FOR: Donna E. Shalala
Assistant Secretary
Policy Development and Research

Subject: Standards of Conduct - Invitation to Serve on Real Estate and Mortgage Institute Advisory Board, New York University

This responds to your request for an opinion as to the legality of your accepting an invitation to serve on the Advisory Board of the Real Estate and Mortgage Institute at New York University. Although HUD's Standards of Conduct, 24 C.F.R. Part 0, limit the types of outside activities in which employees may engage and the extent of their participation in permissible activities, these regulations would permit your participation in the affairs of educational institutions such as the New York University. As explained below, certain limitations imposed by the regulations on such participation turn upon whether you will serve in your personal capacity or as a HUD official.

Section 0.735-204, Outside employment and other activity, provides that:

> (a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:
>
> * * *
>
> (7) Outside activities related to or similar to the substantive programs conducted by any part of the Department. This includes, but is not limited to, the broad fields of real estate, mortgage lending, property insurance, construction, construction financing, land planning, and real estate development.
>
> * * *
>
> (f) This section does not preclude an employee from:
>
> * * *

> (2) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

In my opinion, your service on the Advisory Board to the Real Estate and Mortgage Institute would fall within the exception stated in subsection (f) (2), to the general rule prohibiting outside activities related to or similar to the work of the Department.

The letter of invitation to you from Ann Marcus, Dean of the School of Continuing Education and Extension Services, suggests that having your name (and, presumably, your title) on the list of members of the Advisory Board would provide a significant "boost to women in the field." Because an employee's use of an official HUD title on a listing of any organization may imply that he or she is acting in an official capacity, the Standards of Conduct require certain safeguards where an employee's title is to be so used.

Section 0.735-212, Membership in organizations, provides that an employee may engage in the activities of an organization in an individual capacity (where, as here, there is no violation of § 0.735-204, above) provided that "[h]is official title or organization connection is not shown on any listing or presented in any activity of the organization in such a manner as to imply that he is acting in his official capacity." § 0.735-212(a)(2). Therefore, an employee's title which appears on such an organizational listing must be accompanied by a notation that the title is indicated for identification purposes only and that the person is serving in a personal capacity. Such qualifying language would not be necessary where the employee is serving in an official capacity as a member of a non-Federal or private organization.

Should you wish to serve in an official capacity as a member of the Advisory Board so that use of your HUD title in its membership listings would be permitted without limitation, § 0.735-212 would require that you seek one of two types of authority to do so:

(1) a written determination by the Secretary that such service would be beneficial to the Department and consistent with your service as Assistant Secretary, or

(2) your designation (in writing) by the Secretary or Under Secretary as a "liaison representative" of the

Department to the Advisory Board, upon determination that such service would be beneficial to the Department, and provided that:

- the activity relates to the work of the Department,
- you do not participate by vote in policy determinations of the organization, and
- the Department is in no way bound by any vote or action taken by the organization.

If you accept the invitation to become a member of the Advisory Board in an individual capacity or as Assistant Secretary of HUD, please feel free to consult this office concerning compensation, payment of travel expenses, use of non-public information or other matters in which you may have questions related to the Department's Standards of Conduct.

/s/ Edward W. Morton
Edward W. Morton
Acting General Counsel

HUD-95 (7-78) PREVIOUS EDITION MAY BE US

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: Aug. 24, 1979

IN REPLY REFER TO: 9G:PD

TO : Tad Masaoka
Environmental Staff
San Francisco Area Office, 9.3SS

FROM : William M. North, Jr.
Office of Regional Counsel

SUBJECT: Request for Clearance to Seek an Elective Office

I conclude from your memorandum of August 22, 1979 that you want my approval to run as a candidate for the Office of Trustee for the San Mateo Community College District. You say that the office is non-partisan. However, you do not indicate whether or not the college district is transacting business with HUD. This may be a factor in reaching a decision.

In so far as the Hatch Act is concerned, that Act does not prohibit the active participation in non-partisan elections - even as a candidate. Even though permissible under the Act, we must still resort to our regulations on Standard of Conduct for a determination particularly as they pertain to outside activities or employment. Section 0.735-204(a)(7) of the regulations prohibits outside activities that are related or similar to the substantive programs conducted by any part of the Department. This includes, but is not limited to, the broad fields of real estate, mortgage lending, property insurance, construction, construction financing, land planning and real estate development. It cannot be said that service by a HUD employee as a member of the Board of Trustee of the college district is an impermissible activity under that section since the functions of the school district are in the field of education.

My approval herein must be qualified and conditional upon the determination by your supervisor that the College of San Mateo is not transacting business with HUD. We must reconsider the matter if business is, in fact, being transacted.

Furthermore, I should admonish you that if you become a member of the Board and should the College apply for any type of eligible HUD assistance, that you disqualify and strip yourself from any activity, directly or indirectly, pertaining to that assistance. Any such participation may give the appearance of preferential treatment which is expressly prohibited by our rules.

Regional Counsel

SEP 25 1979

MEMORANDUM TO: Marvin H. Lerman, Regional Counsel

SUBJECT: Standards of Conduct - Outside Activity as Attorney - Susan Olsen

This is in regard to the request you received from Ms. Susan Olsen, Attorney-Advisor for the Boston Area Office, for clarification of the policy set forth in a memorandum from former General Counsel Ruth Prokop to all HUD attorneys, dated September 24, 1978, concerning outside legal activity of attorneys.

Ms. Olsen proposes to prepare and file articles of organization for a nonprofit corporation being organized to promote adult education programs in suburban Boston, and to file for tax-exempt status after the organization is formed. She would receive minimal or no compensation for these services, which would be performed outside of normal duty hours. The organization and its work will have no relationship to HUD programs.

The Department's Standards of Conduct regulations, 24 C.F.R. §0.735-204(c)(1), require an employee to obtain the prior approval of the deputy counselor before engaging in employment in the same professional field as the individual's official position. A memorandum by former General Counsel Ruth Prokop, dated September 20, 1978, stated that an attorney would be denied permission to engage in the private practice of law. In my opinion, the activity proposed by Ms. Olsen is not of the type meant to be covered by Ms. Prokop's memorandum, and approval is not precluded by her policy statement.

In interpreting the Prokop memorandum this office has taken the position that legal services may be performed if the following conditions are met:

(1) the work is performed for a public service organization, relative or friend;

(2) the work is not related to or similar to any of the programs or operations of the Department, and is not otherwise prohibited by 24 C.F.R. §0.735-204;

(3) the work will be performed entirely during nonworking hours;

(4) the work is performed only on an occasional basis;

(5) except in unusual circumstances, the work is being performed for minimal or no compensation; and

(6) the services are not in connection with the prosecution of a claim against the United States and do not involve an appearance in connection with any particular matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. §205)

The activity proposed by Ms. Olsen appears to meet conditions 1-5, above. The work is to be done for a non-profit educational organization having no dealings with HUD and the work will be performed on Ms. Olsen's own time for little or no compensation. The policy to withhold approval of "the private practice of law", as stated in the Prokop memorandum, was addressed primarily to a continuing, established legal practice--not the minimal activity suggested by Ms. Olsen. Approval is therefore permissible in this case if Ms. Olsen limits her activity so that she avoids violation of 18 U.S.C. §205, the restrictions of which are summarized in condition #6, above. She could not, for example, represent an organization before the IRS in connection with its tax status.

Ms. Olsen also raised two specific questions on the interpretation of the Prokop memorandum:

(a) Does the prohibition contained in the Prokop memorandum refer only to engagement in organized "practice of law" in which the scope or volume of work undertaken and the nature of the clients leads to the fact or appearance that the attorney is engaged in an ongoing private practice?

The Prokop memorandum primarily addressed, but was not limited to, the continuing, established law practice. An occasional or infrequent practice which does not meet the conditions outlined above is to be denied approval under the policy stated in the September, 1978 memorandum.

(b) Does the Prokop memorandum prohibit an employee of HUD from engaging in all incidental legal activity, undertaken for friends or family for which compensation may or may not be received, such as will preparation, filing for incorporation and tax-exempt status or acting as an attorney for a non-profit organization?

The policy stated in the Prokop memorandum does not preclude approval of outside legal work if the six conditions stated above are met.

Irving P. Margulies
Acting Deputy General Counsel

Artilia Brown, Program Assistant, 3GA OCT 3 1979

Peter M. Campanella, 3G

Standards of Conduct: Membership on Board of
Community Organization Which Receives CDBG Funds
From Montgomery County Board of Commissioners

You have asked my opinion as Acting Deputy Counselor whether or not your membership on the board of a community organization which operates a community center in Norristown, Pennsylvania and which is funded in part with CDBG funds by Board of County Commissioners of Montgomery County, Pennsylvania is compatible with your employment with HUD.

I have reviewed the matter and am of the opinion that your employment as a Program Assistant in the Regional Counsel's Office is compatible with your board membership.

Section 0.735-212(a), 24 CFR; Standards of Conduct provides that a HUD employee may serve in an individual capacity as a member of a non-Federal or private organization provided that his or her membership does not violate the restrictions contained in section 0.735-204, and his or her official title or organizational connection is not shown on any listing or presented in any activity of the organization in such manner as to imply that he or she as a member is acting in his or her official capacity as a HUD employee.

Section 0.735-204 proscribes the following activities:

1. Acceptance of anything of monetary value under circumstances which may result in or create the appearance of a conflict of interest;
2. Activities which tend to impair the physical or mental capacity of the HUD employee to discharge the duties of his or her position in an acceptable manner;
3. Activities which the public may construe to be official acts of HUD;

4. Activities that establish relationships or property interests that may result in a conflict between the HUD employee's private interest and his or her duties as a HUD employee;

5. Outside activities that may involve the use of information received as a result of employment in HUD to the detriment of the public interest or that may give preferential treatment to any person, group, or entity;

6. Engaging in the real estate business in any form other than personal investment of a moderate size not likely to be involved in the foreseeable future in a HUD program;

7. Outside activities related to or similar to the programs conducted by HUD; and/or

8. Employment by any entity having business directly or indirectly with HUD.

Based on the fact of membership on the board, I do not find any present violation of these restrictions. If, however, at any future time you should believe that your activities as a member of the governing body of the community organization in question would violate any of the restrictions contained in either section 0.735-212(a) or 0.735-204, please consult with me for advice.

As stated at subparagraph (2) of section 0.735-204(f), that section does not preclude a HUD employee from, among other things, participating in the affairs of a nonprofit educational, recreational, public service or civic organization. Accordingly, I am of the opinion that your membership on the board of the community organization which operates a community center in Norristown, Pennsylvania is not in violation of the Standards of Conduct.

/s/ Peter M. Campanella

Acting Deputy Counsel

HUD-96 (7-78) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Esther Valadez, Attorney Advisor,
Los Angeles Area Office, 9.2G

DATE: November 5, 1979

IN REPLY REFER TO:
9G

FROM : Alfred J. DeMartini
Office of Regional Counsel

SUBJECT: Standards of Conduct

Thank you for forwarding a copy of the By-Laws of the Southern California Chapter of NAHRO in relation to the inquiry of a LAAO employee concerning an appointment to the Board of Directors of the local chapter of NAHRO.

The rules governing standards of conduct of HUD employees relative to membership in non-Federal or private organizations are found in Section 0.735-212 of the Departments Standards of Conduct (24 CFR Part 0). In essence, this section provides that an employee may become a member but in an individual capacity only. He may not use his official title nor can his HUD organizational connection be shown on any listing or presented in any activity of the organization in such a manner as to imply that he is acting in his official capacity. Notwithstanding that an employee may serve in an individual capacity, the permission is qualified by specific proscribed actions set forth in other sections of the Rules. Membership in the non-federal or private organization must not violate any restrictions cited in Section 0.735-204 of the Standards, the provision which identifies those activities not compatable with full and proper discharge of government employment.

In assessing the propriety of joining outside organizations, the functions, operations and activities of that entity must be examined in the light of its eligibility for HUD programs as well as the existing or prospective relationship with HUD. After reviewing the objectives and purpose of the Southern California chapter of NAHRO, as set forth in the organization's By-Laws, it is the opinion of the Office of Regional Counsel that acceptance of an appointment by a HUD employee to the Board of Directors of a NAHRO chapter would be in violation of the Departments Standards of Conduct. As a member of the policy making Board of Directors the employee would be engaged in making decisions which relate to the substantive programs conducted by HUD (0.735-204(a)(7)) and he would be performing an important role with an organization which has certainly an indirect and possibly a direct business relationship with the Department (0.735-204(a)(8)). Additionally, although the employee might scrupulously guard against it, his actions might create the appearance of giving preferential treatment in the performance of his government responsibilities to certain individuals with whom he has a relationship through his NAHRO position.

For these reasons, it is our conclusion that the HUD employee should be advised that acceptance of an appointment to the Board of Directors of the Southern California chapter of NAHRO would place him in violation of the Department's Standards of Conduct.

Membership only in NAHRO, as distinguished from sitting on the Board of Directors, would not generate the objections set out above. An employee may, if he so wishes, join the organization as a regular member, provided he abides at all times by the precaution and conditions set forth in Section 0.735-212.

This matter has been discussed with the Office of the Associate General Counsel for Finance and Administrative Law and the opinion expressed here has been concurred in by that office.

Alfred L Martin
Associate Regional Counsel

William M. North, Jr.
Regional Counsel

August 13, 1979

Mr. James D. Scanlon
3606 S.14th Street
Arlington, Virginia 22204

Re: Outside Employment; Public
Accountant/Tax Preparation

Dear Mr. Scanlon:

This is in response to your request for permission, pursuant to § 0.735-204 of HUD's Standards of Conduct, 24 C.F.R. Part 0, to operate an office in the District of Columbia as a public accountant. You state that a recently enacted D. C. law requires that you maintain an office in the District in order to retain your accounting license. You state that your accounting practice is small, primarily involves income tax preparation and has had no dealings with persons or firms having business with HUD. Because maintaining an office is necessary to retention of your license and your practice appears not to be related to HUD activity, we have no objection to your opening an office to conduct a general accounting practice, provided that you observe the limitations imposed by this Department's Standards of Conduct regulations and Federal conflict of interest statutes.

Section 0.735-204 of the Department's Standards of Conduct regulations, which imposes limitations on employees' outside employment and activities, provides that:

> (a) An employee shall not engage in outside employment or other outside activity not compatible with . . . his Government employment. Incompatible activities include but are not limited to:
>
> (1) Acceptance of [compensation] in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;
>
> (2) Outside activities which tend to impair his mental or physical capacity to perform his Government duties . . .
>
> * * *
>
> (7) Outside activities related to or similar to the substantive programs conducted by any part of the Department . . .

an important role with an organization which has certainly an indirect and possibly a direct business relationship with the Department (0.735-204(a)(8)). Additionally, although the employee might scrupulously guard against it, his actions might create the appearance of giving preferential treatment in the performance of his government responsibilities to certain individuals with whom he has a relationship through his NAHRO position.

For these reasons, it is our conclusion that the HUD employee should be advised that acceptance of an appointment to the Board of Directors of the Southern California chapter of NAHRO would place him in violation of the Department's Standards of Conduct.

Membership only in NAHRO, as distinguished from sitting on the Board of Directors, would not generate the objections set out above. An employee may, if he so wishes, join the organization as a regular member, provided he abides at all times by the precaution and conditions set forth in Section 0.735-212.

This matter has been discussed with the Office of the Associate General Counsel for Finance and Administrative Law and the opinion expressed here has been concurred in by that office.

Alfred Martin
Associate Regional Counsel

William M. North, Jr.
Regional Counsel

August 13, 1979

Mr. James D. Scanlon
3606 S.14th Street
Arlington, Virginia 22204

Re: Outside Employment; Public
Accountant/Tax Preparation

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Section 0.735-204 of the Department's Standards of Conduct regulations, which imposes limitations on employees' outside employment and activities, provides that:

> (a) An employee shall not engage in outside employment or other outside activity not compatible with . . . his Government employment. Incompatible activities include but are not limited to:
>
> (1) Acceptance of [compensation] in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;
>
> (2) Outside activities which tend to impair his mental or physical capacity to perform his Government duties . . .
>
> * * *
>
> (7) Outside activities related to or similar to the substantive programs conducted by any part of the Department . . .

(8) Employment with any person, firm, or other private organization having business either directly or indirectly with the Department.

The accounting practice you describe does not appear to violate these provisions. You should note, however, that preparation of tax returns specifically related to HUD programs is prohibited under § 0.735-204(a)(7). Dealings with persons or organizations having business, either directly or indirectly, with the Department is prohibited under § 0.735-204(a)(8). You must practice on your own time, of course, using non-Government property and facilities.

Federal criminal conflict of interest statutes impose additional limitations of particular importance to a tax practice. 18 U.S.C. § 205 prohibits a Government employee from representing others before a court or Government agency in matters in which the United States has an interest. You therefore may not represent a client before the IRS. In the conduct of your practice, you should follow the limitations set forth in the enclosed memorandum dealing with the preparation of tax returns as well as those imposed by the Standards of Conduct.

Sincerely,

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

Enclosure

NOV 30 1979

Marlaina Kiner, Regional Counsel
Seattle Regional Office, 10 G

Marilyn G. Wagner, Office of General Counsel, GI

Outside Employment; Appraiser

This is in response to your question whether a HUD employee working as a PC&R Clerk in the Seattle Area Office may accept part-time employment conducting commercial single-family appraisals for a local firm. The firm does not do any fee-appraising work for HUD or appraisals with mortgage insurance applications pending. The employee has no contact with the Area Office's single-family valuation unit or mortgage credit section.

As you state in your memorandum, it has been the Department's policy to prohibit HUD employees from conducting outside appraisals. This prohibition, which is based on the Department's Standards of Conduct regulations, 24 C.F.R. Part O, is applicable in this case.

Section 0.735-204(a) of the Standards of Conduct regulations prohibits an employee from engaging in:

> (7) Outside activities related to or similar to the substantive programs conducted by any part of the Department. This includes, but is not limited to, the broad fields of real estate, mortgage lending, property insurance, construction, construction financing, local planning, and real estate development.

This provision has been interpreted as prohibiting any HUD employee from conducting private appraisals during off-duty hours. This restriction applies regardless of the employee's position in the Department and regardless of whether the outside employer has dealings with HUD. A memorandum dated December 1, 1978, dealing with this prohibition is attached for your information.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

Attachment

JUL 1 8 1979

I. Margaret White, Manager, Richmond
Area Office, 3.4S

3GA

Peter M. Campanella, Region III, Philadelphia, Pa., 3G

Standards of Conduct: Post Employment Restrictions
Upon Former HUD Employee; Monroe Park Towers,
FHA Project No. 051-35114-PM-SHM

This is in reply to your memorandum dated July 13, 1979, in which you inquire whether or not Mr. Carroll M. Mason, former director, Richmond Area Office may act as a consultant to the sponsor of the subject project in developing an acceptable work-out proposal for this project whose mortgage is currently held by the Secretary. You further advise that at a meeting held in the Area Office on June 14, 1979, Mr. Mason attended as a consultant to the sponsor.

The proscriptions against the post employment activities of a former government employee are to be found in title 18 U.S.C. section 207. This is a criminal statute. Accordingly, any advice or opinions which we render is not binding on any court or prosecutor, and the former employee would be well advised to consult with his own lawyer in his determination as to what conduct is or is not proscribed by the statute. There is nothing in the statute which bars a former government employee from employment with an entity which had dealings with that employee while he was employed with the government.

The restrictions imposed upon a former government employee who left his government employment before July 1, 1979 may be summarized as follows. First, section 207(a) bars a former government employee from acting as agent or attorney for anyone other than the United States in any matter in which the United States is a party or has a direct or substantial interest and in which the former employee participated personally and substantially during his employment. This bar is permanent and its application can only be determined from a complete analysis of the facts in each particular situation.

The second proscription of section (207(b), id.) is against appearing personally before a Court, department or agency for a period of one year following the termination of one's government employment in a matter which was under the former employee's responsibility within a period of one year prior to his termination of his federal employment. This proscription, while broader in scope as to the matters it could conceivably cover, is limited in that it has a one year limitation period and proscribes only personal appearances by former employees.

It would appear, then, from the facts as you relate them that the second proscription against Mr. Mason's appearance before HUD in the subject case is no longer applicable, since more than one year has elapsed since the termination of his employment with HUD. With respect to the first proscription, the permanent bar to representation in a matter in which Mr. Mason had both a personal and substantial participation, this would require a complete analysis of all facts in the case before any determinations could be made.

/s/ Peter E. Campanella
Acting Deputy Counselor

Alfred R. Marcks, Jr., Deputy Manager
Philadelphia Area Office, 3.2D

JUL 1 9 1979

3GA

Peter M. Campanella, Region III, Philadelphia, 3G

Standards of Conduct: Relationship of Former Employee with Department; Continued Eligibility For Disability Retirement Pension, Post Retirement Activities

This is in response to your memorandum of July 9, 1979 wherein you ask two questions concerning the post employment activities of a former HUD employee, and Mr. Clement's memorandum of July 2, 1979, copy attached. It is suggested that you correspond directly with Mr. Clement relative to the subject matter of this memorandum.

The Standards of Conduct do not apply to former employees who by definition are not subject to their coverage. The provisions of 18 U.S.C. 207 apply to the post employment activities of former government employees. Since this is a criminal statute, any opinion which we render is at best advisory, not binding on any court nor prosecutor, and the former employee is well advised to consult private counsel for an opinion whether or not his actions are in violation of the restrictions of section 207 of title 18.

The restrictions of section 207, id. which apply to employees who left the Department before July 1, 1979 can be summarized as follows. Section 207(a) is a permanent bar against a former employee acting as agent or attorney for another in any particular matter involving a specific party or parties in which the former employee was personally and substantially involved while he was employed by the government. Section 207(b) is a one year bar against acting as agent or attorney in particular matters involving a specific party or parties that had been under the former employee's oficial area of responsibility during his last year in office. Nothing in the statute prohibits a former employee from accepting employment with any entity regardless of the dealings that the entity may have had with the former employee while he was a government employee.

With respect to whether or not the former employee's post employment activities bar or would otherwise jeopardize his disability pension, you are advised that CSC (now OPM) Phamplet 18, "Your Retirement System" (copy attached for Mr. Clement's information) under item F-33 responds to that question as follows:

> "Earning capacity is considered restored if, in each of 2 consecutive calendar years, the annuitant's income from wages or self-employment, or both, is at least 80 persent of the current salary of the position (underlining supplied) from which he or she retired."

As to the question of whether or not a disabled annuitant, whose earning capacity exceeded the 80 percent limitation for two consecutive years, could then be eligible for a discontinued-service annuity, that question is responded to in item F-37 of the aforementioned pamphlet as follows:

> "The annuitant is considered involuntarily separated as of the date disability annuity stops and, depending on the length of service, would be eligible to draw one of the following annuities:
>
> (a) Deferred annuity which would begin when age 62 is reached.
>
> (b) Discontinued-service annuity after at least 20 years of service if age 50 or older, or after 25 years of service regardless of age, which would begin immediately after the termination of the disability annuity."

It is suggested that you recommend to Mr. Clement, if he has any additional questions concerning his retirement, that he contact the regional office or write to the Bureau of Retirement, Insurance and Occupational Health, Office of Personnel Management, Washington, D.C. 20415.

/s/ Peter M. Campanella

Acting Deputy Counselor

9 AUG 1979

MEMORANDUM TO: William J. White, General Manager, New Community Development Corporation

Subject: Post-employment restrictions

This is to confirm advice given to you by Jocelyn Schaffer, an attorney on my staff, concerning 18 U.S.C. § 207, the conflict of interest statute imposing certain restrictions on representational activities by former Government employees. You have asked whether this statute would prohibit your assuming a position as president of a mortgage banking firm having dealings with HUD, following termination of your employment with the Department as General Manager of the New Community Development Corporation on August 10, 1979. You have also asked whether the statute would prohibit your representation of persons previously involved in New Communities matters, with respect to new matters which may arise following the termination of your HUD employment.

While 18 U.S.C. § 207 will impose certain limitations on your activities as president of the mortgage banking firm, it does not prohibit your assuming that position. The four post-employment restrictions applicable to you as a former "senior employee" will prohibit only certain types of representational activity; they do not prohibit your pursuing any work involving your former agency--even where that work is related to matters in which you were previously involved, as long as the four prohibitions are not violated. These restrictions, explained in detail in regulations given to you by Ms. Schaffer, may be summarized as follows:

1. You are permanently barred from representing another before the United States in connection with any particular matter involving specific parties, in which you participated personally and substantially as a Government employee.

2. For two years following termination of Government employment you are barred from representing another before the United States in connection with any particular matter involving specific parties, which was pending under your official Government responsibility during your last year of that responsibility.

3. For two years following termination of Government employment you may not, by personally appearing before the United States, assist someone in representing another in connection with a particular matter involving specific parties in which you participated personally and substantially as a Government employee.

4. For one year following termination of your HUD employment you may not represent yourself or anyone else before HUD in connection with any old or new particular matter.

Provided that the position you wish to assume would not require that you engage in any of these four types of prohibited representational activity, the statute does not preclude your acceptance of the job.

The statute also would not prohibit your representing, before the Government, any party with whom you had dealings as a HUD official on a particular matter, provided that: 1) the matter on which you would now represent such party is neither one in which you participated as a HUD official nor one which was pending under your official HUD responsibility during your last year of that responsibility, and 2) if any such representational activity is to be before HUD or any of its employees, you must not engage in such activity until the expiration of one year following termination of your HUD employment.

Please feel free to call upon this office if you should have any further questions concerning the post-employment restrictions imposed by 18 U.S.C. § 207.

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

24 AUG 1979

Joseph Burstein, Esq.
Fried, Frank, Harris, Shriver
& Kampelman
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

Re: Post-employment
Conflict of Interest

Dear Mr. Burstein:

This will confirm our recent discussions concerning the permissibility of your representing a client who is under contract with the developer of Shirley Duke Apartments, an FHA rehabilitation project. During your employment as Counselor to the Secretary of HUD you advised the Secretary concerning possibilities for rehabilitation of the deteriorating Shirley Duke project so that it could be occupied by low-income families. The law firm by which you are now employed represents a small contractor who will be performing some work on this apartment project under a contract with the developer. You have asked whether your prior involvement with the project would preclude your representating this client in matters not involving HUD or any court appearances, under 18 U.S.C. § 207, which prohibits certain representational activity by former Government employees.

18 U.S.C. § 207 provides, in relevant part:[1]

> (a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a

---

[1] The statute is quoted as it appeared before its amendment by the Ethics in Government Act of 1978. The Ethics in Government Act amendments apply only to persons who, unlike you, terminated their Government service on or after July 1, 1979.

> direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed,
>
> * * *
>
> Shall be fined not more than $5,000, or imprisoned not more than one year, or both.

It is my opinion that your representation of this contractor would not involve any switching of sides within the prohibition of the statute. Although the contractor will perform work on a project in which you had some involvement during your HUD employment, he was not a party to, and you would not be representing him in connection with, the same matters on which you advised the Secretary of HUD. Because your representation of this client would not involve particular matters in which HUD is a party or has a direct and substantial interest and in which you participated as a HUD employee, it would not be prohibited by 18 U.S.C. § 207.

Another fact that keeps your proposed representation outside the scope of the statute is that it will not involve any appearance before or communication (made with the intent to influence) to a court or agency of the United States. Although the statute does not clearly state that certain representational activity is prohibited only before a Federal forum, the Department of Justice has consistently interpreted the statute in this way, and this interpretation was formalized by an amendment to this provision by the Ethics in Government Act. Because neither the subject matter of your representation nor the forum (both of which must meet certain criteria to fall within the prohibition) are properly within the scope of the statute, your proposed representation of this client is permissible.

Please feel free to call upon this office if you have any further questions concerning the post-employment restrictions.

Sincerely,

Marilyn G. Wagner for
Irving P. Margulies
Acting Deputy General Counsel

Alfred J. DeMartini, Associate Regional Counsel, Region IX   OCT 2 1979

Marilyn G. Wagner, Office of General Counsel

Standards of Conduct--Limitations on Investment Property

This is in response to your memorandum of July 18, 1979, which raises two questions concerning the reference to "a moderate scale of investment properties" found in §§ 0.735-204(a)(6)(ii) and -205(a)(8) of the Department's Standards of Conduct regulations, 24 C.F.R. Part 0. Areas of particular concern are joint ownership of real estate and the employee's interest in the property of a spouse. You ask:

1) In determining if an employee has exceeded the limit of six investment properties permitted by the Standards of Conduct (0.735-204(a)(6) and 0.735-205(a)(8)), is the percentage of ownership held in each property or the number of properties in which the employee holds some interest the determinative factor?

§ 0.735-204(a)(6) limits the purchase, sale or management of real property by HUD employees to transactions concerning a moderate scale of investment properties. In the case of residential property, the regulation specifies six units as an example of "moderate scale". Because the provision relates an employee's activities to the scale of investment properties involved, the percentage of ownership held by an employee should be considered when applying the "six unit rule" to an employee's purchase or sale of real estate. Thus, for example, an employee who purchases a 75% interest in a residential building with eight apartments does not violate section 0.735-204(a)(6) because the employee has a share equivalent to six residential units. Management of more than six units of residential property is prohibited regardless of the employee's ownership interest.

While the share owned by the employee is relevant where a purchase or sale is made during the period of HUD employment, § 0.735-204 does not limit ownership where there is no purchase of real property. An employee may keep any property acquired prior to employment and any property inherited during employment regardless of the number of units owned, provided he or she does not manage more than a moderate scale of investment property, and absent any other actual or apparent conflict of interest (see § 0.735-205).

2) Is the community property interest of an employee's spouse attributable to the employee for the purposes of applying the limit of six investment properties?

Section 0.735-205(c) provides:

> The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relatives who are residents of the employee's household.

A spouse's acquisition of real estate for speculative purposes, attributed to an employee by this section, is prohibited by § 0.735-205(a)(8). Because § 0.735-205(c) does not apply to the limitations on outside activity found in § 0.735-204(a)(6), a spouse's purchase, sale or management of real estate is not attributed to the employee. Thus, for example, a spouse could independently purchase and manage a ten unit apartment building in which there is no HUD involvement, without any violation of § 0.735-204(a)(6) by the employee if the latter acquires no interest in the property and does not share management responsibilities. Because community property is attributed to both the spouse and the employee, the purchase of more than six units of community property by either the spouse or the employee would be prohibited under § 0.735-204(a)(6).

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

P. A. Townsend, Kansas City Regional
Office, 7G

NOV 16 1979

Marilyn G. Wagner, Office of General Counsel, GF

Purchase of Seven-Unit Building by Employee

This is in reply to your memorandum of October 16. , a Program Aide in the Loan Management Branch of the Kansas City Area Office has asked permission to purchase a seven-unit apartment building to be used as a rental property. The total purchase price is $17,000. She and her husband already own a single family rental property acquired at a cost of $21,000. Neither property is now involved in a HUD program nor is such involvement foreseeable.

As you know, the HUD Standards of Conduct regulation, 24 C.F.R. §0.735-204(a)(6), characterizes the following activity as incompatible with the full and proper discharge of the duties and responsibilities of Government employment:

> "Engaging directly or indirectly in the purchase, sale or management of real estate ...except...(ii) realty transactions involving a moderate scale of investment properties (normally, not more than six units in the case of residential properties) which are not likely in the foreseeable future to be involved in a HUD program."

The proposed purchase will give this employee a total of eight units of residential investment property, but I do not regard six units as a limit which may never be exceeded. In the context of the regulation "six units" is an illustration of the general restriction that an employee's investment properties be of a "moderate scale". I regard the acquisition of seven units for $17,000 as a moderate scale of investment properties, even when combined with the single unit already owned. Accordingly, the proposed purchase is not prohibited by §-204(a)(6).

Before approving the purchase you should satisfy yourself that the seven-unit apartment, which has an extremely low price for the area, and which may therefore be in poor condition, complies with the local building code. Enclosed is a copy of the Merit Systems Protection Board's opinion in the matter of upholding the removal of a HUD employee based in part on the charge that ownership of deteriorating residential property violated 24 C.F.R. §0.735-201(a), (b)(1) and (2). The employee should be informed of her responsibility for maintaining investment property in good condition.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law
Division

Enclosure

12 JUL 1979

MEMORANDUM TO: James W. Mast, Chief, Administrative Law Judge

SUBJECT : FOIA Request on Debarment Case -
Gerald B. Hill, Docket No. 79-644-DB

This responds to your memorandum of June 21, 1979 in which you request legal guidance in the handling of a Freedom of Information Act request for certain documents generated in the course of a debarment proceeding. The request from a local newspaper, seeks copies of "documents submitted both on behalf of and against Gerald B. Hill, the former executive director of the Beaufort Housing Authority." It is the opinion of this office that the requested information must be released.

It is my understanding that the following documents have been "submitted" to you in the course of the debarment proceeding:

1) The Department's Motion to Suspend Debarment and Memorandum in Support Motion

2) Stipulation

3) Letter dated June 1, 1979 (containing copy of transcript and serving as brief on behalf of Mr. Hill).

The FOIA requires that all records maintained by a Federal agency be disclosed except to the extent that a document falls within the scope of nine narrow exemptions set forth in the Act. The only exemption which may be applicable to the requested records is Exemption 5 of the FOIA which authorizes the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

The courts have interpreted this provision to encompass predecisional documents containing the advise opinion and recommendations of agency staff. Items 1 and 2 as identified above do not appear to be predecisional in nature and therefore are not exempt under the FOIA. Item 3 is not within the scope of Exemption 5 because it emanates from a source outside of the Federal Government.

The requester has further asked that we waive any fees we might incur in responding to the request. It is the policy of the Office of Public Affairs that FOIA requests from members of the media be handled without the imposition of any charges.

Accordingly, you should release the information cited in Items (1)-(3) of this memorandum without charge to the requester. If other documents are responsive to the request, they too should be released assuming there is no statutory basis for withholding. Should you have any further questions in this regard please do not hesitate to contact me or Michel Silver of my staff.

(signed) Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

16 JUL 1979

Ms. Sharon A. Bembery
7054 Eastern Avenue, N. W.
Washington, D. C. 20012

Re: Freedom of Information Act Appeal
for Personal Resumes

Dear Ms. Bembery:

This responds to your letter of May 21, 1979 in which you appeal the denial of personal resumes requested under the Freedom of Information Act (FOIA). These resumes constituted a part of the technical proposal submitted by BLK Inc., for a contract awarded under the "Women and Mortgage Credit Project." The Office of Procurement and Contracts provided you with the BLK proposal, excluding the resumes on the basis of Exemption 4 of the FOIA which authorizes the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Upon consideration of your appeal we agree that the resumes in question are not within the scope of Exemption 4 of the FOIA. However, it is the opinion of this office that the identities of the proposal project staff should be deleted in order to avoid a clearly unwarranted invasion of personal privacy.

The determination to release the resumes with the identity of the subjects deleted was based, in part, on the fact that only one proposed staff member is actually working on the grant. The release of the resumes would therefore not be competitively harmful to BLK. The disclosure of the identifiable resumes, however, would reveal the previous experience and interests of the subject individuals, would indicate these individuals' interests in other employment, and may connote the fact that the contractor ultimately determined that the individuals were not qualified to work on the proposed contract. Given these considerations it is the opinion of this office that the release of the identifiable resumes could potentially endanger the employment prospects of the proposed staff thereby constituting a clearly unwarranted invasion of personal privacy. The names are therefore exempt from disclosure by 5 U.S.C. § 552(b)(6). It has further been determined that there is a need in the public interest to withhold these names in order to safeguard the privacy expectations of the proposed staff, 24 C.F.R. § 15.21.

I have also enclosed copies of the contracts between HUD and the three groups receiving funds under the Women and Mortgage Credit Project

(League of Women Voters, National Council of Negro Women and Harvard College). Your initial request for the "Projects" of these three groups left some doubt whether you were seeking their proposals or the resultant contracts and you were therefore asked to clarify this portion of your request in accordance with HUD Handbook 1327.1, Freedom of Information Act, Section 2-5(d).

While the scope of your request is still not clear, we are forwarding the contracts to you. Because this information was never denied to you within the meaning of the FOIA I do not believe that the matter requires any further consideration on the part of the Office of General Counsel. Should you need any further information relative to the Women and Mortgage Credit Project, I suggest you contact the Policy and Evaluation Branch of the Office of Procurement and Contracts.

Please be advised that you have a right to judicial review of this determination pursuant to 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,

(signed) Irving P. Margulies

for Edward W. Norton
Acting General Counsel

Enclosures

10 AUG 1979

John T. Boese, Esq.
Fried, Frank, Harris, Shriver &
Kampelman
Suite 1000
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

Re: Freedom of Information Act
Appeal for Intra-agency
Memoranda

Dear Mr. Boese:

I am responding to your letter of June 22, 1979 in which you appeal the denial of information requested under the Freedom of Information Act (FOIA). Certain documents, pertaining to the use of mortgage-backed securities to collateralize tax-exempt obligations issued to finance hospital projects, were withheld from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), which authorizes the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Your appeal raises the following issues:

1. Adequacy of the Search: Whether the search for records conducted by the Department was "sufficiently thorough" particularly with respect to back-up materials relating to the Task Force Report (Item 2) and records constituting communications between HUD and other federal agencies (Item 4).

2. Justification for Withholding: Whether the Department has sufficiently justified the withholding of information under Exemption 5 of the FOIA.

3. Segregation of Non-Exempt Material: Whether the Department has reasonably segregated and released non-exempt portions of the withheld documents.

4. Statement of Agency Policy: Whether the Abstract of Secretarial Correspondence dated March 20, 1979 (to Under Secretary Jay Janis from Fred Taylor, Acting Executive Vice President, GNMA) is a statement of policy required to be disclosed under the FOIA.

5. Public Interest in Disclosure: Whether the public interest warrants the withholding of the exempt information.

Upon reviewing these issues I have determined that the initial denial was justified and hereby affirm that decision for the reasons set forth below:

1. Adequacy of the Search: The response to your initial request involved several organizational units within the Department. Upon receipt of your appeal these offices were again contacted and queried as to the existence of other documents responsive to the request. Only four additional documents were discovered. All of these documents were earlier drafts of the final Task Force Report. Since these drafts are very similar to the final Report in form and substance, they are also exempt from disclosure pursuant to Exemption 5 of the FOIA. I have enclosed copies of the releasable portions of the documents for your review.

I understand that your concern regarding the adequacy of our search arises from the importance of this issue to the Department and your assumption that additional communications and materials should exist. The Department, however, is not required, under the FOIA, to maintain a written record of communications or draft material. Reporter's Committee for Freedom of the Press v. Vance, 422 F. Supp. 383 (D.D.C. 1977), aff'd, No. 77-2220 (D. C. Cir. Nov. 7, 1978). The responsible offices have conducted their searches in good faith, using methods which could reasonably have been expected to produce the requested documents, and you have been informed of all documents located. Thus, the obligations imposed on the Department by the FOIA have been fully met. Cerveny v. CIA, 445 F. Supp. 772 (D. Colo. 1978).

2. Justification for Withholding: The FOIA requires that an agency notify a requester of its determination "and the reasons therefore" within 10 working days of receipt of the request. The Department's initial denial stated that the withheld information was comprised of predecisional advice, opinions and recommendations and was, therefore, exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5). A careful review of all of the withheld documents and portions of documents confirms our initial determination that only advice, opinions and recommendations which pertain to the Department's consideration of the viability and impact of the use of GNMA securities as part of a combination financing plan proposed by various hospital projects have been withheld. As such, these documents are exempt from disclosure. Further, it is our opinion that the above explanation constitutes an adequate statement of our justification for withholding these documents.

3. Segregation of Non-Exempt Material: Of the documents which have been identified pursuant to your request, only one, the draft regulations, has been withheld in its entirety. Our review of the nondisclosed material indicates that it can be properly withheld under Exemption 5 of the FOIA. Item 6 of the request encompassed records reflecting consideration of applications by hospitals for approval of financing plans using mortgage-backed securities to collateralize tax-exempt obligations. The three documents pertinent to this request which were withheld in part contain predecisional advice, opinions or recommendations. The factual portions of these records have been segregated and released in accordance with the mandate of the Act. See Mink v. EPA, 410 U.S. 73 (1973). To the extent that there is an occasional factual statement contained in the withheld documents these statements are "inextricably intertwined" with the deliberative process in that "the very choice of facts reveals the concerns of the agency and the deliberations of staff personnel." Koch v. Department of Justice, 376 F. Supp. 313, 317 (D.D.C. 1974), citing, Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974); Soucie v. David, 448 F.2d 1067, 1077-1078 (D.C. Cir. 1971).

4. Statement of Agency Policy: In your appeal you imply that the document in question is required to be released as an "order or interpretation" applied by the Department because the memorandum predated, by nine days, HUD's determination with respect to Beth Israel's application. Predecisional memoranda which have been "expressly adopted" by an agency in reaching a final determination are available for public inspection. Sears, Roebuck and Co. v. NLRB, 421 U.S. 132 (1975). However, the courts have considered and rejected the extension of this rule to predecisional memoranda which have not been expressly mentioned in the final decision. Grumman Aircraft Engineering v. Renegotiation Board, 421 U.S. 168, 185-188 (1975); United States v. J. B. Williams Co., 402 F. Supp. 796, 802 (S.D.N.Y. 1975). Therefore, we do not believe the nonfactual portions of the March 20 abstract are required to be released under the FOIA.

5. Public Interest in Disclosure: The Department's Freedom of Information Act regulations, 24 C.F.R. § 15.21 state that:

> A requested record shall not be withheld from inspection or copying unless it both (1) comes within one of the classes of records exempted by 5 U.S.C. 552, and (2) there is a need in the public interest to withhold it.

The information which has been withheld deals with a sensitive and important policy issue which is now being considered by the

Department. In the opinion of this Office, the disclosure of the exempt information would impair the quality of the agency's deliberative process. This concern is accentuated by the fact that there has not yet been a final resolution of these issues.

Upon consideration of the aforementioned issues, this Office concludes that the information which was initially denied to you was properly withheld pursuant to Exemption 5 of the FOIA. Further, there is a need in the public interest to withhold the information. Accordingly, we affirm the initial determination.

In addition, we are denying your request that we provide an index itemizing the withheld documents which is correlated with the statutory justification for withholding each document. As you recognized in your letter of appeal, such indices have only been required in the context of judicial review of agency final determinations. See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974). As a policy matter, we have determined that the burden of providing such indices at the agency appeal level would often preclude timely responses. Further, in this case, only one exemption is cited to justify our decision to withhold all documents; under these circumstances, the preparation of a *Vaughn*-type index would be an exercise with only marginal, if any, utility.

Please be advised that you have the right to seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4).

Sincerely,

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

Enclosures

AUG 3 1 1979

Mr. Melvin Shapiro
3701 7th Avenue
San Diego, California 92103

Dear Mr. Shapiro:

This responds to your letter of August 12, 1979 in which you appeal the denial of a Freedom of Information Act request for a report on the San Diego Housing Authority. This report, prepared by Peter Garcia of the Los Angeles Area Office was initially denied pursuant to 5 U.S.C. §552(b)(7)(A), which authorizes the withholding of investigatory records compiled for law enforcement purposes...to the extent that the production of such records would (A) interfere with enforcement proceedings..." Upon review of your appeal we have determined to affirm the initial denial based upon 5 U.S.C. §552(b)(7)(A), (C) and (D).

As an initial matter we note that an agency which applies the controls and sanctions of a Federal statute, executive order or substantive regulation having the force and effect of law is engaged in law enforcement activities. HUD has primary responsibility for various Federal programs which are governed by civil statutes and violations of these statutes may result in criminal or civil proceedings. A document is an "investigatory record compiled for law enforcement purposes" if the purpose for its creation was an agency's inquiry into specific conduct which may be found to have violated a Federal statute or regulation. The information we have received concerning the San Diego report indicates that the report was prepared in response to specific allegations of wrongdoing. The Department's investigation of these allegations resulted in a determination to forward the report to the Department of Justice. The Department of Justice investigation was still pending as of July 31, 1979. Given the status of this case, we conclude that the San Diego report is an investigatory record.

Release of the report at this time could interfere with enforcement activities within the meaning of §552(b)(7)(A) by enabling potential defendants to destroy evidence or otherwise thwart the investigation. Confidential information provided by witnesses could subject them to possible reprisals. Based on these considerations it is the opinion of this office that portions of the San Diego report should also be withheld pursuant to 5 U.S.C. §552(b)(7)(C) and (D) ("investigatory records compiled for law enforcement purposes...to the extent that production of these records would (C) constitute an unwarranted invasion of personal privacy, [or] (D) disclose the identity of a confidential source...")

Notwithstanding any public interest in disclosure of the report which reveals the management practices of the San Diego Housing Authority it appears that the public interest would be better served at this time by protecting the confidentiality of the investigatory efforts which are currently in progress, 24 C.F.R. §15.21.

Please be advised that you have the right to judicial review of this determination pursuant to 5 U.S.C. §552(a)(4).

Sincerely,

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

NOV - 8 1979

Ms. Ruth M. Louie
Assistant Vice President for
  Development
Housing Innovations, Inc.
50 Franklin Street
Boston, Massachusetts 02110

Re: Freedom of Information
Act Appeal--Fair Market
Rent Worksheets

Dear Ms. Louie:

This responds to your letter of September 25, 1979, in which you appeal the denial of a Freedom of Information Act (FOIA) request for the worksheets for determining fair market rents for Baltimore apartments. This information, which comprises HUD form 52507A, was withheld pursuant to 5 U.S.C. § 552(b)(4), which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Having considered the merits of your appeal, we have decided to affirm the initial denial.

It is our understanding, based upon copies of correspondence you have submitted and conversations with our Baltimore Area Office, that you have been in further contact with the Baltimore Office following your receipt of the initial denial letter of August 6, 1979. It appears that on August 10 you spoke to Ina Singer--the Freedom of Information Officer in HUD's Baltimore Office--and, upon learning that the rent information in question was not disclosable, you requested the names of the apartment buildings for which rent information had been furnished. These names were released to you by letter on August 14, which letter you received on August 15. Then, on September 12, you wrote to the Baltimore Office, again requesting the fair market rent worksheets; this request was also denied, since the information sought remained exempt under FOIA and there was determined to be a continued need in the public interest to withhold it.

In your September 25 letter appealing the denial of your request for the fair market rent worksheets, you maintain that it has not been explained to your satisfaction "why such rent information, and these worksheets in particular, is considered trade secrets and confidential." Court cases construing Exemption 4 of FOIA have clarified what is meant by "confidential" in this context:

> [c]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely...
> (1) to impair the Government's ability to obtain necessary information in the future...

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); see also National Ass'n of Government Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978). In compiling the information contained on form 52507A, HUD seeks the voluntary cooperation of similarly situated commercial apartment concerns, which are asked to furnish various rent-related statistics: apartment unit size, utilities included, rent charged, etc. HUD then compares these figures to determine what would be the "fair market rent" for the area in question. We believe that if we were routinely to release form 52507A to the public, apartment owners would be far less inclined to cooperate with HUD, since the information furnished is clearly commercial in nature and its general dissemination might well prove competitively harmful. Because HUD cannot compel apartment concerns to cooperate, and because form 52507A is an integral part of HUD's housing program function, the disclosure of the information you seek would, in our view, impair HUD's "ability to obtain necessary information in the future." National Parks, supra. As such, the information falls within Exemption 4 of FOIA, and its initial and continued nondisclosure is legally justified.

Your appeal letter asserts that you are concerned "only" with the statistical information appearing on form 52507A, and that "[w]e will accept the raw data which has been rearranged to protect the names of the apartment complexes." Ordinarily we would have no objection to the release of a fair market rent worksheet after deleting the names of the apartment complexes, since rent information *in the abstract* is probably not "confidential commercial information" within the meaning of 5 U.S.C. § 552(b)(4). Here, however, we note that you have already specifically requested, and have received, the names of the apartments appearing on form 52507A. For this reason, your present willingness to accept a version of the 52507A which "protect[s] the names of the apartment complexes" does not overcome the applicability of Exemption 4. Were we to release the information you now seek, you would have in your possession all of the information contained on the fair market rent worksheet; but as explained above, the worksheet in its entirety is exempt under FOIA, and was properly withheld initially. We cannot permit the piecemeal release of a document, where the document as a whole is exempt from disclosure.

For the reasons discussed above, we affirm the initial withholding of the fair market rent worksheet, and we further decide that you are not now entitled to the raw data contained therein.

Please be advised that you have the right of judicial review of this determination pursuant to 5 U.S.C. § 552(a)(4).

Sincerely,

(Signed) S. Leigh Curry, Jr.

S. Leigh Curry, Jr.
Acting Deputy General Counsel

NOV 1 9 1979

MEMORANDUM TO: David S. Cordish, Director, Office of Urban Development Action Grants

SUBJECT: Release of Materials Related to Action Grant Projects

I am responding to your memorandum of August 22, 1979, in which you requested an opinion regarding the release of materials relating to two Action Grant Projects, portions of which are otherwise exempt from public disclosure under the Freedom of Information Act. The documents in question, Area and Central Office reviews of two UDAG applications (submitted by Key West, Florida and New Orleans, Louisiana) and financial statements of the project principals were requested by the Subcommittee on Housing and Urban Affairs (hereinafter Subcommittee). Your memorandum further states that this information was requested by then Secretary-Designate Moon Landrieu, also in relation to the confirmation hearings.

We have subsequently been informed that the information was released to the Subcommittee (pursuant to the oral concurrence of this office) and that Mr. Landrieu as Secretary-Designate neither requested nor received any of the files pertaining to the UDAG applications.

Therefore the only issues to be addressed pertain to the disclosure of information to the Subcommittee. The issues are as follows:

1) What was the legal basis for such disclosure and

2) Whether information released to the Subcommittee may be withheld from others pursuant to an FOIA request.

It is the opinion of this office that the financial statements and HUD reviews had to be released to the Subcommittee and such disclosure does not waive the Department's ability to assert the exemptions provided in the FOIA.

As we have previously advised you, portions of Area and Central Office reviews of UDAG applications are exempt from public disclosure pursuant to 5 U.S.C. §552(b)(5) which authorizes the withholding of "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This provision has been interpreted by the courts to include agency comments which are comprised of advice, opinion and recommendation. The exemption is designed to protect the integrity of the deliberative process and as such does not encompass factual statements. If the Area Office reviews contain factual statements, these must be segregated and released to any member of the public.

The personal financial statements are protected from disclosure by Exemptions 4 and 6 of the FOIA as well as by the Trade Secrets Act, 18 U.S.C. §1905. Exemption 6 (5 U.S.C. §552(b)(6)) permits an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 4, (5 U.S.C. §552(b)(4)), authorizes an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The Trade Secrets Act makes it a crime for a Federal employee "to disclose. . .the amount or source of any income, profits, losses or expenditures of any firm, partnership, corporation or association" unless otherwise authorized by law.

In the context of the request from the Subcommittee, the FOIA specifically provides that the statute "is not authority to withhold information from Congress." 5 U.S.C. §552(c). The prohibitions of the Trade Secrets Act do not apply where the request for information is from a duly authorized committee of Congress having jurisdiction over the subject matter of the request because such disclosure is then "authorized by law." 41 Op. Atty. Gen. 221 (1955). The Subcommittee, in seeking these documents in the course of its confirmation hearings, was acting within the scope of its authority, as set forth at Section 134(a) of the Legislative Reorganization Act of 1946, as amended, 2 U.S.C. §190(b) (Cum. Supp. 1977) which provides in pertinent part that:

> (a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each committee may make investigations into any matter within its jurisdiction [and] may report such hearings as may be had by it...

The UDAG files were therefore released to the Subcommitte without violating the Trade Secrets Act.

The remaining issue is whether the disclosures to the Congress affected the status of FOIA requests for the same information from the public. The Court of Appeals for the District of Columbia has held that disclosure by an agency to a Congressional Committee does not waive the exempt status of documents requested under the FOIA. Aspin v. Department of Defense, 491 F. 2d 24, 26 (D.C. Cir. 1973). Accordingly, the Subcommittee's access to the UDAG information will not destroy the confidentiality of the files.

Release of the Key West or New Orleans files did not waive the exemptions as they pertain to other UDAG reviews or financial statements, since each claim of exemption is adjudged on a case-by-case basis.

I hope this satisfactorily responds to your questions.

Irving P. Margulies

Irving P. Margulies
Associate General Counsel

NOV 27 1979

Mr. Raymond DeLeo
President
Raymond Construction Company, Inc.
328 High Street
Bristol, Rhode Island 02809

Re: Freedom of Information
Act Appeal - Review of
Section 8 Preliminary
Proposals

Dear Mr. DeLeo:

This responds to your letter of October 1, 1979, in which you appeal the denial of a Freedom of Information Act (FOIA) request for documents pertaining to a review and evaluation by the Manchester New Hampshire Service Office of preliminary proposals for the development of a Section 8 project in Somersworth, New Hampshire. Your initial request was denied in part on the basis of 5 U.S.C. §552(b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." Having reviewed the documents in question and considered the merits of your appeal, we have determined to reverse the initial denial.

As you have identified them in your letter appealing the initial denial, the documents which were initially withheld and continue to be at issue at this time are the following:

(1) a sheet prepared by HUD staff containing numerical rankings of preliminary proposals submitted in response to a Notification of Fund Availability (NOFA);

(2) a HUD evaluation of all such proposals submitted; and

(3) a substantial portion of a memorandum from Joseph Garaffa to Stanley J. Caren, both of the Manchester Service Office, summarizing the results of the proposal evaluations and recommending selection of a particular developer.

Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5) (quoted above) has been construed by the courts to authorize the withholding of intra-agency documents containing the advice, opinions or recommendations of staff members. N.L.R.B. v. Sears Roebuck and Company, 421 U.S. 132, 151 (1975). In our opinion, all of the documents here at issue fall within the scope of this exemption. The ranking sheets requested constitute, at bottom, staff members' opinions on the application of certain selection criteria to the proposals being considered, and inherent in a ranking system is the recommendation that the highest-ranked proposal be selected. Similarly, the evaluation sheets reflect the opinions of the persons performing the evaluations, and are likewise withholdable under Exemption 5. Finally, the memorandum from Garaffa to Caren contains recommendations concerning the selection of a developer, after summarizing the results of the above-mentioned evaluation process. Accordingly, these portions of the memorandum are exempt from disclosure under Exemption 5 and the Sears decision.

Your contention that "all aspects of the [decision-making process] which ripen into a final decision" must be released is supported neither by the FOIA nor the case law. On the contrary, it is only when pre-decisional memoranda are expressly adopted in an agency final decision that such memoranda lose their exempt status under FOIA:

> [W]e hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Sears, supra, at 1521-22; see also American Mail Line, Ltd. v. Gulick, 411 F. 2d 696 (D.C. Cir. 1969).

Applying this reasoning to the facts here, we note that the "final decision" made by HUD--that is, the letter notifying Coolidge and Cullinane that its proposal had been accepted--neither adopts nor makes reference to the ranking sheets, the evaluation sheets, or the Garaffa memorandum requested here. Therefore, these pre-decisional documents remain exempt under FOIA.

Despite this conclusion, we agree with your contention that withholding the documents at issue here is not in the public interest. We believe that competing Section 8 developers are entitled to review HUD working documents which evaluate and compare the proposals submitted and which recommend the selection of a particular developer; access to this information will better enable developers in the future to prepare proposals responsive to the needs of this Department, which in turn will benefit the public which this Department serves. Accordingly, we find the Manchester Service Office's determination that "there is a need in the public interest to withhold these records from public inspection" to have been erroneous, and we therefore are directing the Manchester Office to release to you the documents initially withheld from your inspection which provide the basis for this appeal.

Sincerely,

SIGNED

Jane McGrew

DEC 12 1979

Mr. John D. Saillant
129 Shaw Avenue
Cranston, Rhode Island 02905

Dear Mr. Saillant,

I am responding to your memorandum of November 1, 1979, in which you appeal the denial of your Freedom of Information Act (FOIA) request for the names of the merit staffing evaluation panel and the ratings they assigned to you in their selection of an individual for the position of Deputy for Management in the Providence Service Office. I have directed the Boston Area Office to provide you with a list of those persons who comprised this merit staffing panel. However, for the reasons discussed below, I have determined that information which identifies the panel participants with specific scores is exempt from disclosure pursuant to Section (b)(5) of the FOIA, 5 U.S.C. §552(b)(5), which authorizes the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Exemption 5, which incorporates the traditional civil discovery privilege for internal deliberative communications, was intended to encourage the free and candid exchange of advice, opinion and recommendation among agency staff. The identities of employees who prepare, review or approve exempt information are also exempt under this provision. Tax Reform Research Group v. IRS, 419 F. Supp. 415 (D.D.C. 1976). Disclosure of the names of panel members in a manner which would reveal their specific comments or ratings could impair the integrity of the Department's deliberative process by causing panel members to temper their comments in the future. There is, therefore, a need in the public interest to withhold the identities of panel members as they appear on the rating sheets 24 C.F.R. §15.21. Moreover, disclosure of the list of panel members, where the names are not attributed to specific comments, adequately identifies the official duties of federal employees without endangering the decision-making function of the panel.

2

Please be advised that you have the right to judicial review of this determination pursuant to 5 U.S.C. §552(a)(4)(B).

Sincerely yours,

/s/

Jane McGrew
General Counsel

11 SEP 1979

Gloria M. Jimenez, Federal Insurance
Administration, I

Marilyn G. Wagner, Office of General Counsel, GF

Alfred F. Cypes and Company, Inc.; National Crime
Protection; Ad Print Design, Inc. - Federal Crime
Insurance Package

Your July 6, 1979 memorandum to Kathleen Sauerbrunn concerning the above-captioned matter has been referred to the Administrative Law Division for a response, which follows.

Your memorandum raises the questions whether the participation of the above-captioned firms in a campaign to promote and sell insurance under the Federal Crime Insurance Program constitutes a violation of 18 U.S.C. § 709, and whether the purported copyright of certain promotional materials printed by said firms would contravene the Federal copyright laws, particularly 17 U.S.C. § 105.

Having reviewed the documents furnished and the applicable law, and after consulting with Willie Taylor of your staff, we conclude:

(1) The names of the firms involved do not violate 18 U.S.C. § 709;

(2) Ad Print Design, Inc. may legally copyright the materials so indicated, but it must adequately identify those portions thereof which consist of Government publications not subject to copyright protection;

(3) To impose a charge for furnishing application materials to prospective customers, as National Crime Protection seeks to do, would be contrary to Federal regulations;

(4) Alfred F. Cypes and Company, Inc. should not be permitted to identify itself in any context as "Solicitor for Federal Crime Insurance"; and

(5) Through their advertisements, National Crime Protection and Alfred F. Cypes and Company, Inc. may be attracting prospective applicants whom the firms have no legal authority to service.

Discussion

(1) "National Crime Protection" is a New York-based firm which has mounted an advertising campaign to sell Federal Crime Insurance. 18 U.S.C. § 709 makes it a Federal crime to use

> the words 'national', 'Federal', 'United States', 'reserve', or 'Deposit Insurance' as part of the business or firm name of a person, corporation, partnership, business trust, association or other business entity engaged in the banking, loan, building and loan, brokerage, factorage, insurance, indemnity, savings or trust business. . . .

However, § 709 further provides that "[t]his section shall not make unlawful the use of the word 'national' as part of the name of any business or firm engaged in the insurance or indemnity business. . . ." In light of this express exception carved out for insurance companies using the word "national" in their names, the firm name of "National Crime Protection" is legally unobjectionable.

(2) Ad Print Design, Inc. has prepared for distribution a 16-page booklet entitled "How to Get U.S. Federal Government Sponsored Crime Insurance" which has been designed to aid individuals in completing insurance applications. Ad Print has applied for copyright protection for this booklet, the front cover of which contains the standard warning that "no part of this work may be reproduced or transmitted in any form or by any means including photocopying and recording without written permission of the copyright holder."

It appears, however, that a substantial portion of the materials in the booklet are either reprinted or taken verbatim from preexisting Government publications. Page 5 is a reprint of page 11 of HUD NEWS issuance No. 78-163, May 19, 1978; the text accompanying the "Protective Device Requirements" section, pages 6 and 8, is taken verbatim from page 8 of the Federal Crime Insurance Program Manual, published by HUD; page 7 is a reprint of page 9 of the HUD NEWS issuance referred to above; under "Exclusions", on pages 8-9, letters (a) through (j) have been copied verbatim from the HUD Federal Crime Insurance regulations, 24 C.F.R. § 1933.5; on page 10, the first paragraph under "How to Report Claims" is taken verbatim from 24 C.F.R. § 1931.6; on page 11, the "Penalties for False Statements" section has been copied verbatim from 24 C.F.R. § 1931.9; and pages 14-16 are a reprint of official form HUD-1620. (We note, parenthetically, that on its copyright application Ad Print claimed as "original work" all of the materials on pages 6, 8, 9, 10 and 11. The foregoing summary demonstrates that this is a blatant misrepresentation.)

It is a fundamental of Federal copyright law that "[c]opyright protection under [Title 17] is not available for any work of the United States Government . . ." 17 U.S.C. § 105. The Copyright Law defines "work of the United States Government" as "aswork prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101. There can be no question that the above-described HUD publications from which Ad Print reprinted its materials constitute "works of the United States Government," and therefore the above-specified portions on pages 5-11 and 14-16 of the Ad Print booklet cannot be copyrighted by virtue of the prohibition contained in 17 U.S.C. § 105.

As noted above, the booklet contains a warning against reproduction of any part thereof. To the extent that the booklet contains public domain materials not subject to copyright protection, this warning is of course meaningless; but the warning will be certain to mislead readers of the booklet, who for the most part will be ignorant of the legal infirmity of the warning. Accordingly, in our view this blanket warning should be removed, and the booklet should contain an appropriate disclaimer identifying specifically those portions thereof which constitute Government works outside the scope of the Ad Print copyright.

(3) As evidenced by the advertisement it intends to publish, National Crime Protection plans to charge a fee for mailing appropriate materials to prospective applicants. Such a practice would constitute a clear violation of the HUD Federal Crime Insurance regulations, which provide at 24 C.F.R. § 1930.4(d) that

> No service, placement or other fee shall be charged by any agency, broker, or servicing company, to any applicant or property owner under the program.

As an agent for the sale of Federal Crime Insurance, National Crime Protection falls squarely within the above-quoted prohibition against imposing fees upon applicants. Accordingly, National Crime Protection should be advised that its intended practice is illegal.

(4) On the Insurance application form and on its advertisements, the firm of Alfred F. Cypes and Company, Inc.

identifies itself as "Solicitor for Federal Crime Insurance." In our view, the use of the word "Solicitor", with a capital "S", may create the false impression that Alfred F. Cypes, Inc. is officially and/or exclusively involved in the administration or promotion of the Federal Crime Insurance Program. In fact, the Cypes firm is merely one of many agents who participate in the program pursuant to 24 C.F.R. § 1930.4(a), under which the Federal Insurance Administrator

> offers to pay to any eligible agent or broker a commission . . . with respect to each Federal Crime insurance policy he procures for any eligible property owner. . . . [Emphasis supplied]

We feel that the "Solicitor" label, to the extent that it implies an exclusive franchise to sell Federal Crime Insurance, may discourage potential agents from competing with Cypes for business. Moreover, the official-sounding title might induce prospective applicants to approach Cypes rather than other agents, again giving Cypes an unwarranted competitive advantage. Accordingly, we recommend that Cypes discontinue using the phrase "Solicitor for Federal Crime Insurance," or any similar phrase implying a special relationship with the program or the Government.

(5) It appears from its advertising materials that National Crime Protection has envisioned a multi-state campaign to attract Federal Crime Insurance applicants. This is evidenced by a number of facts: the advertisement lists all of the states in which Federal Crime Insurance is available; the application order form contains such directions as "Missouri residents please dial . . ." and "N.Y. Residents please add appropriate sales tax;" and the advertisement claims that "This Insurance is Available to You REGARDLESS OF THE AREA IN WHICH YOU LIVE."

Pursuant to the HUD regulations governing the Federal Crime Insurance Program, an agent or broker is only eligible to process Federal Crime Insurance policies if such agent or broker "is, at the time of making application for the policy, authorized to act as an agent or broker with respect to the State where the insured premises are located . . ." 24 C.F.R. § 1930.4(e). Accordingly, unless National Crime Protection is so authorized in every state participating in the Program, its advertisement constitutes an offer to provide a service for which National Crime Protection may have no legal authority. We therefore recommend that it be ascertained exactly in which states National Crime Protection has the authority to act as an insurance agent, and that its advertising materials be revised to clearly indicate the limited scope of its offer.

The preceeding discussion (Point 5) applies as well to the firm to Alfred F. Cypes and Company, Inc.

Conclusion

Based upon the foregoing discussion, it is apparent that there are several potential problems with the materials which National Crime Protection and Alfred F. Cypes and Company, Inc. have furnished this Department. We believe that these firms should be immediately informed that their materials as submitted are unsatisfactory, for the reasons discussed in this memorandum, and that any revision should be reviewed by HUD before dissemination to the general public.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

DEC 11 1979

Gloria M. Jimenez, Federal Insurance
Administration, I

Marilyn G. Wagner, Office of General Counsel, GF

Alfred F. Cypes and Company, Inc.; National Crime
Protection; Ad Print Design, Inc. - Federal Crime
Insurance Package

This responds to your memorandum of October 4, 1979, in which you ask our opinion concerning the applicability of 18 U.S.C. §709 to the use of letters "HUD" on the literature published by the above-referenced firms. We understand, from subsequent conversations with Donald Collins of your staff, that your particular concern arises from the subject's distribution of HUD forms 1621 and 1631 as application forms for Federal Crime Insurance. Based upon our review of these materials, we do not believe that such distribution constitutes a violation of 18 U.S.C. §709.

We note that the pertinent portion of §709 provides as follows at paragraph nine:

> Whoever . . . falsely advertises or falsely represents by any device whatsoever that any . . . business . . . has been in any way endorsed, authorized, inspected, appraised or approved by the Department of Housing and Urban Development. . . [or] the Government of the United States. . . shall be punished . . . by a fine of not more than $1,000. . .

On both the residential (HUD-1621) and the commercial (HUD-1631) insurance application forms, the firm Alfred F. Cypes & Co., Inc. has included its name and address, to which applicants are instructed to mail the completed forms. Implicit in this instruction is the representation that Cypes has been "authorized" or "approved" by HUD as an agent for the sale of Federal Crime Insurance. However, in order to trigger the applicability of 18 U.S.C. §709, the representation referred to must be "falsely" made - that is, there must be a misrepresentation.

READEX FICHE best copy available

We do not believe that the circumstances here point to any such misrepresentation. According to HUD regulations at 24 C.F.R. §1930.4(a), "the insurer [Federal Insurance Administrator] hereby offers to pay to any eligible agent or broker a commission . . . [for] each Federal crime insurance policy he procures for an eligible property owner. . ."

The regulations further provide, at §1930.4(e), that:

> an eligible agent or broker means an agent or broker who is, at the time of making application for the policy, authorized to act as an agent or broker with respect to the State where the insured premises are located and who has not been suspended or debarred by the insurer.

Any local insurance agent who meets the above criteria qualifies to sell Federal crime insurance policies to the general public. In our view, an insurance agent's satisfaction of the requirements contained in 24 C.F.R. §1930.4 constitutes HUD "approval" within the meaning of 18 U.S.C. §709. Assuming, therefore, that Alfred F. Cypes & Co., Inc. qualifies as an "eligible agent or broker", the fact that its name appears on the HUD insurance application form would not amount to a "false representation" of HUD's authorization or approval, and thus there would be no violation of 18 U.S.C. §709.

However, we note that on the application form Cypes identifies itself as "Solicitor for Federal Crime Insurance." We reemphasize here the conclusion in our September 11, 1979 memorandum to you that this appellation is improper; in fact, we believe that the use of this phrase constitutes a violation of 18 U.S.C. §709. In this context, the work "solicitor" implies an official or exclusive arrangement with HUD, beyond the general authority to sell Federal crime insurance conferred by 24 C.F.R. §1930.4. To this extent, the phrase infers that Cypes has been specially endorsed by this Department as a Federal crime insurance carrier. But this inference is clearly false, since Cypes stands on an equal footing with all of the other local insurance carriers who participate in the Program. Accordingly, we believe that the "Solicitor for Federal Crime Insurance" label constitutes a "false representation" of an official HUD "endorsement" in violation of 18 U.S.C. §709, and therefore Cypes' use of this phrase should be discontinued.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

10 SEP 1979

MEMORANDUM TO: Geno C. Baroni
Assistant Secretary
Neighborhoods, Voluntary Associations
and Consumer Protection

SUBJECT : Inquiry Concerning Competitive Bidding Procedures for HUD-Owned Properties

This responds to an oral inquiry of August 9, 1979 by Anne Jaskiewicz of your staff requesting information on the Federal statutes and procedures referred to in a letter dated July 2, 1979 (attached) from Milton J. Francis, Deputy Assistant Secretary for Single Family Housing and Mortgagee Activities, to Alfonso T. Smith, President of the Citizens Council of the Southwest-englewood Community (CCSC). The subject letter, concerning the sale of ten HUD acquired properties, was written in response to a letter of June 9,11979 from Alfonso T. Smith, on behalf of the CCSC. Mr. Francis' letter of July 2, states, in pertinent part:

> In December 1978, the Chicago Area Office requested the authority to sell the ten properties in question at a fixed sales price with prequalification of prospective purchasers. This request was denied since Federal statutes require that agencies obtain competition in the sale of property. This is the premise upon which the current procedures were established which require that HUD-owned properties be sold to the individual submitting the highest acceptable offer above a minimum acceptable sales price.

With regard to this passage, information is requested on (1) what Federal statutes require that agencies obtain competition in the sale of property and (2) what procedures require that HUD-owned properties be sold to the individual submitting the highest acceptable offer above a minimum acceptable sales price. The relevant statutes and their applicability to the Property Disposition Program are discussed below.

The Federal Property and Administrative Services Act of 1949 (40 U.S.C. §471 et seq.) generally requires that in the sale or disposition of property owned by the Government, competitive bidding procedures should be employed. See 40 U.S.C. §484(e). In implementing this statute, the

Federal Property Management Regulations require, in relevant part: "[t]he advertising for bids shall be made at such time previous to the disposal or contract, through such methods and on such terms and conditions as shall permit that full and free competition which is consistent with the value and nature of the property involved." 41 C.F.R. §101-47.304-7.

The above referenced statute and regulations reflect the overall governmental policy of full and fair competition with respect to the disposition of property. It must be pointed out, however, that with respect to the HUD Property Disposition Program, §602(d)(11) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. §474(11)) grants to HUD and any officer thereof, an exemption from the provisions of the cited Act.

> Nothing in this Act shall impair or affect any authority of --
>
> * * * *
>
> (11) the Department of Housing and Urban Development or any officer thereof with respect to the disposal of residential property, or of other property (real or personal) held as part of or acquired for or in connection with residential property, or in connection with the insurance of mortgages, loans, or savings and loan accounts under the National Housing Act;
>
> * * * *

With respect to the FHA's (HUD's) exemption from the 1949 Act, however, it was observed in 39 Comp. Gen. 426, 428-29, that:

> House Rept. No. 670, 81st Cong., p. 28, on H.R. 4754, which with some modification became the Federal Property and Administrative Services Act of 1949, pointed out that the special exemptions from the act * * * were intended to have only a limited effect. In the language of this report:
>
> "It is not intended by these exemptions that those administering the agencies or programs listed shall be free from all obligation to comply with the provisions of the Act or from all jurisdiction of the Administrator. On the contrary, it is expected that they will, as far as practicable, procure, utilize and dispose of property in accordance with the

provisions of the Act and the regulations issued thereunder, particularly so far as common use items and administrative supplies are concerned. * * * In other words, to the extent that compliance with the Act and submission to the jurisdiction of the Administrator will not so 'impair or affect the authority' of the several agencies to which the subsection applies as to interfere with the operation of their programs, the Act will govern. Any disputes that arise can be settled by the President under the authority to prescribe policies and directives vested in him by Section 205(a)."

The President in his letter to all executive agencies of July 1, 1949 (14 F.R. 3699), the effective date of the Federal Property and Administrative Services Act, acting under the authority vested in him by the Act also directed in this respect as follows:

"Section 502(d) [now 602(d)] of the Act provides that certain programs and functions now being carried on by various executive agencies shall not be impaired or affected by the provisions of the Act. However, the attention of these agencies is called specifically to the purposes of this legislation and they shall, in so far as practicable, procure, utilize and dispose of property in accordance with the provisions of the Act and the regulations issued thereunder in order that the greatest overall efficiency and economy may be effected * * *.

From the foregoing, it appears clear that the Congress and the President intended that uniform systems and procedures would be established for use by the various agencies covered by the act, except that certain agencies were to be exempt to the extent that compliance would impair or affect the carrying out of their programs. Since uniform procedures were to be established it was a matter of necessity to place the authority to establish such uniform procedures in one person, the Administrator of General Services. [Emphasis in original.]

In referring to the above-cited legislative history, the Comptroller General stated in 45 Comp. Gen. 277, at 271, that:

> In view of the above legislative history, it has been the consistent position of this Office that the uniform systems and procedures established by GSA regulations pursuant to the Federal Property and Administrative Services Act of 1949 should be followed by the various Federal agencies even though they may have other specific statutory authority, or may have been granted certain exemptions from the act, unless to do so would impair or affect the carrying out of the specific programs otherwise authorized. See B-127011, June 6, 1961.

Consistent with the foregoing, the competitive procedures embodied in the Federal Property Management Regulations implementing the Federal Property and Administrative Services Act of 1949 are applicable to HUD in the sale of properties unless adherence to the regulations would impair the Property Disposition Program. Accordingly, the procedures set forth in the HUD Property Disposition Handbook, which are based upon the Federal Property Management Regulations, provide that all bids be considered and that either the strongest offer or the highest offer meeting or exceeding the minimum advertised price be accepted. See Property Disposition Handbook (4310.5), One to Four Families, Chap. 10, ¶¶ 289-1, 2, 9/27/77.

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

Attachment

JUL 2 1979

Honorable Robert A. Anthony
Chairman
Administrative Conference of
the United States
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

Dear Mr. Anthony:

This is in response to your letter, dated January 26, 1979 requesting the Department of Housing and Urban Development to provide complete information to you on our procedures for administering HUD's several discretionary grant programs. You further requested that we advise you of "the extent to which existing or revised procedures, or further planned revisions, accomplish fulfillment of the procedures and approaches" proposed in the letter's attached recommendations, developed by the Administrative Conference to implement the Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224.

In response to your request for complete information on HUD procedures for administering our discretionary grant programs, we refer your attention to (1) 24 CFR Part 570, Subparts A, B, C, E, J, K and O; (2) the Section 701 Comprehensive Planning Assistance Program, 24 CFR 600; and (3) the Community Development Block Grant Program, general provisions for grant and cooperative agreements which have been developed by the HUD Office of Procurement and Contracts (Attachment A).

Furthermore, there follows below summaries of the three Administrative Conference recommendations and our comments with respect to each.

1. Recommendation 71-4, MINIMUM PROCEDURES FOR AGENCIES ADMINISTERING DISCRETIONARY GRANT PROGRAMS

This recommendation calls for agencies: to give potential applicants effective notice in various publications of the availability of grant funds; to develop by rulemaking and periodic review procedures to be followed by applicants and criteria for the selection of grantees under each program; to notify applicants of agency action pertaining to them; and to make these notifications available for public inspection.

HUD's present procedures are fairly consistent with this recommendation except in the public notice area. We find the "Public Notice" portion of this recommendation, which suggests that notice requirements be published in the Federal Register, to be unduly onerous for a small grant program. Therefore, you may wish to consider a minimum grant amount for programs which would be subject to the public notice recommendation. Additionally, public notice may not be necessary for every grant program. For example, under our Housing Counseling Grant Program (Consumer Programs), to qualify as an applicant for a Housing Counseling grant the applicant must have been formally recognized by HUD to have met HUD's minimum requirements. As a result, HUD is necessarily aware of all housing counseling agencies in the country which qualify for housing counseling grants. Thus, we send grant applications directly to them. However, it may be reasonable to publish notice of the requirements which must be met to qualify as a housing counseling grantee.

2. Recommendation 71-9, ENFORCEMENT OF STANDARDS IN FEDERAL GRANT-IN-AID PROGRAMS

This recommendation suggests several approaches to help agencies in securing grantees' compliance with Federal standards without incidentally halting worthwhile programs or adversely affecting the interests of private persons intended to be benefited through Federal financial assistance. The recommendation, which does not apply to research, training, or demonstration grants or to fellowships, states that grantor agencies should provide a procedure for the impartial consideration of substantial complaints by affected persons that a grantee or applicant has failed to meet Federal standards in its application for Federal funding, its data submissions, or its administration of a funded program. It also suggests that agencies should condition their grants upon a grantee's establishment of fair procedures for handling less substantial complaints, and should seek to assure that adequate information about management of grant-in-aid programs is made accessible in a timely manner to persons affected by the program.

Recommendation 71-9 also calls upon grantor agencies to seek to develop an adequate range of performance incentives and sanctions, short of a total cut-off of funds, for ensuring grantee compliance with Federal standards. These sanctions should include, in appropriate cases, public disclosure of a grantee's failure to comply with Federal standards, injunctive action to require the grantee to fulfill any assurances of compliance, disallowance of nonconforming expenditures, denial of funds to affect only the noncomplying portion of a program, imposition of additional administrative requirements designed to assure that a noncomplying grantee brings its operations into compliance, and transfer of a grant to a different grantee.

A. The Federal Administrative Complaint Procedure

In HUD programs to which this recommendation applies, 24 CFR 570.303(f) and (g) provide the only formal guidelines for consideration of complaints by persons wishing to object to approval by HUD of a particular application for discretionary assistance. HUD Handbook 5550.1, dated January 8, 1977 (Attachment B), prescribes a procedure used by the Department in handling consumer complaints.

B. The Grantee's Administrative Complaint Procedure

Applicants for Small Cities comprehensive block grants are required under 24 CFR 570.426 to prepare and implement a written citizen participation plan which provides for answering complaints in a timely and responsive manner. These citizen participation requirements also apply to certain other grants.

It is not clear whether this recommendation pertains to cooperative agreements. Nonetheless, we have not required cooperating parties receiving assistance, as a condition of their cooperative agreements, to establish a procedure for handling complaints other than the Department's complaint handling mechanism.

C. The Information System

This portion of the recommendation is, for the most part, already implemented and utilized by HUD. Public participation at all stages is the technique by which we assure access to information. 24 CFR 570.431 prescribes citizen participation requirements to be followed by our

Small Cities single purpose block grant program. More extensive citizen participation is required for Small Cities comprehensive grants. Citizen involvement is required under the regulations governing Section 701 Comprehensive Planning Assistance grants (see 24 CFR 600.80). Full public access to program information is required in the block grant program. It has not been determined whether these guidelines will apply to cooperative agreements. Additionally, we find that extensive distribution of materials and information, as you recommend, may be burdensome and unnecessary in small grant programs. Therefore, you may wish to consider establishing minimum grant amounts for programs which would be subject to this recommendation.

D. Range of Sanctions

HUD presently has sanctions to encourage compliance with Federal standards from persons who receive Federal financial assistance for sanctions against grantees under our Community Development grant program, we refer your attention to 24 CFR 570.910-913. Mechanisms for protecting HUD from non-performance by grantees under this grant program, as well as other grant programs, include corrective advice, exercise of contract conditions, and more drastic remedies such as funding adjustments or actions to recover funds. Frequently, these mechanisms (sanctions) are triggered by results obtained from audits of the grantees, conducted by the Department's Inspector General's Office.

E. Performance Incentives

Discretionary Block Grants are made annually. A recipient's performance is a determinative element in HUD's consideration for refunding the grantee in subsequent years. In addition, the Urban Development Action Grant (UDAG) program limits eligibility to cities and urban counties which are not only distressed or in need, but have also demonstrated results in providing housing to low and moderate income persons and promoting equal opportunity in housing and employment. Finally, under the Section 701 Comprehensive Planning Assistance Program, extra incentive grants are made available to participants in area wide housing opportunity plans. Thus, we presently have mechanisms for incentives which are an effective supplement to the sanctions described above.

3. Recommendation 74-2, PROCEDURES FOR DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

This recommendation states that each agency that has discretion in the distribution of assistance under a domestic assistance program should structure its discretion by publicly identifying the specific results it expects the assistance to achieve and any major technical obstacles which may hinder the achievement of these results. It also calls for agencies to develop and periodically review rules that set forth criteria for the award of aid based on the formulation of desired results, and to establish suitable procedures to deal with complaints that the grantor or grantee has violated applicable standards, criteria, or other requirements. While it recognizes that considerable judgment and flexibility are sometimes required, the recommendation calls generally for agencies to state their grant objectives, criteria and requirements with as much specificity as practicable to enable determinations to be made on a rational and justifiable basis.

A. Scope of the Recommendation

HUD generally agrees with the substance of this aspect of the recommendation.

B. Articulation of Objectives, Criteria and Requirements

Presently, our grants and cooperative agreements are made on the basis of established criteria and requirements which have been expressed in writing with as much specificity as possible, and with a clear indication of the purpose of the award.

C. Complaint Procedures

Our comments regarding this aspect of the Recommendation 74-2 are basically the same as the comments under complaints in Recommendation 71-9.

In closing, we hope that we have provided you sufficient information concerning our procedures for administering HUD's discretionary grant programs and that our comments on the procedures and approaches suggested in your recommendations are useful.

Sincerely yours,

/s/ Jay Janis
Jay Janis

6 AUG 1979

MEMORANDUM FOR: Joseph Sherman
Director
Division of Energy, Building
Technology and Standards

SUBJECT : San Antonio Ranch
Solar Research Grant

This responds to your request for a legal opinion regarding your authority to settle the grantee's claims under a grant agreement between San Antonio Ranch and this Department for the construction of solar energy systems. As we indicated informally to your staff, based upon our review of the facts of the grant agreement, it is our opinion that you have the authority to negotiate and settle the pertinent claims of the grantee pursuant to termination of the grant, consistent with the termination provisions in the grant agreement. The facts presented to us and our analysis are set forth below.

Factual Background

On January 28, 1976, pursuant to the Solar Heating and Cooling Demonstration Act of 1974, P.L. 93-409, HUD awarded San Antonio Ranch LTD (SAR), a new town, a $75,000 grant in the first cycle of solar demonstration grant awards. This $75,000 was to pay the cost for design, purchase and installation of the solar heating, cooling and domestic hot water systems in three single family homes. Payment of the grant to SAR was to be made in three installments: 20% or $15,000 upon completion of the design (this installment has been paid); 70% or $52,500 upon completion of construction and submission of a report regarding construction; and 10% or $7,500 upon completion of marketing the homes and submission of a final report. Neither the construction or final reports have been received by HUD; therefore, $60,000 of the grant amount has not been paid to the grantee. Under the grant agreement, each home was to be built at SAR by a different builder, on lots previously sold to the builders by SAR. The grant agreement No. H-2353, was entered into solely between HUD and SAR. Under completely separate agreements, to which HUD was not a party, SAR contracted with Travis Brown to design the solar systems and with

Honeywell to supply the systems. SAR conducted a bid process and selected Dillard Company, Inc. (Dillard) to install the solar systems. Thereafter, SAR and the respective builders of the three homes entered into contracts to permit construction of the homes at SAR, installation of the solar systems in the constructed homes, and a rebate on the land price. In each contract SAR required the builder to contract with Honeywell for the facilities and technical services needed in the installation of the solar system and to contract with Dillard for installation of the system in each of the three homes. Consequently, each builder entered into a contract with Honeywell, and a contract with Dillard.

The grant agreement between HUD and SAR called for the solar systems design to be completed in June, 1976; the installation to be checked out in December, 1976; and completion of home construction and solar system installation in January, 1977. Marketing of the homes was planned for spring, 1977. Two of the three demonstration homes were sold by the builders in the spring of 1977. The third home was not sold until a later time. Prior to sale of the homes, Dillard, the installer of the systems, represented to SAR that the solar systems were installed and operational. However, Honeywell, the supplier of the systems, advised SAR during the early months of 1977 that the systems were not installed properly and were not operational. Nevertheless, all three homes were sold. Since the sale of the homes, complaints have been received continuously from occupants and builders of the homes concerning the solar systems.

The grant agreement between HUD and SAR provides at Part A, Section 2.2B that "the grantee [SAR] shall procure, install and construct the solar system according to the drawings and specifications approved by HUD." The grant agreement also provides at Section 2.2B that "the grantee shall perform operating tests on the solar system prior to marketing or renting the project." Further, Part A, Section 3.3 requires the grantee to "submit a short report on the construction process including any problems or highlights of unusual construction experiences." Part A, Section 3.4 requires the grantee to submit a final report. The latter report, covering the period between the completion of construction and final sale or occupancy of the project, under the agreement is "to record marketing and initial occupancy activities including any problems with the solar system's initial operations."

HUD received a letter from SAR, dated November 28, 1978, verifying that none of the solar systems were functional, that Dillard's installation failed to comply with the plans and specifications which Dillard agreed to, and that Dillard was unwilling and unable to repair the systems. According to your records, no operating tests were performed on the solar systems prior to marketing the homes.

By letter, dated November 15, 1978, the Department was notified that Mrs. Cran, an owner of one of the three homes, has filed suit against all the parties involved in the construction of her home and the installation and manufacture of the sole air conditioning unit on her house. By letter, dated October 26, 1978, San Antonio Ranch was given notice of a suit filed by Mercantile Bank and Trust, which took over one of the buildings when the builder (borrower), J. H. Cupit, went bankrupt.

Mercantile Bank alleged that SAR's requiring J. H. Cupit to contract with the Dillard Company, Inc., for the installation of the solar system and with Honeywell, Inc. for Honeywell facilities and technical services gave rise to implied warranties: 1) that the systems would be installed by Dillard in a good and workmanlike manner and 2) that the facilities and technical supplies of Honeywell were marketable and fit for the particular purpose of insuring proper operation of the solar system. Mercantile Bank further alleges that the solar system was not installed in a good and workmanlike manner and that Honeywell's facilities and technical services were not marketable and fit for the particular purposes of insuring proper operation of the solar system.

Discussion

You have requested an opinion from our office regarding your authority to settle claims of the grantee, SAR, under this grant agreement and the present facts. Based upon our review of the facts and the terms of the agreement, we believe that your office has the authority to negotiate and settle the pertinent claims of the grantee either by unilateral termination of the grant for the convenience of the Government, termination by mutual consent of the parties, or by termination for good cause.

Part E, Section 1 of the grant agreement, provides in relevant part:

> (a) Grant termination by HUD: The grantee agrees that the grant award official may, at any time after written notice and after opportunity for consultation has been afforded in the grantee, terminate the grant, in whole or in part, through a written termination notice specifying the effective date of the termination action.
>
> (1) A grant may be terminated by HUD for good cause subject to negotiation and payment of termination settlement costs.

> (2) The grantee agrees that, upon such termination, it will return or credit to the United States that portion of grant funds paid or owed to the grantee and allocable to the terminated project work, except such portion as may be required by the grantee to meet commitments which had become firm prior to the effective date of termination and are otherwise allocable.
>
> (3) Whenever feasible, the grant award official and the grantee shall enter into a termination agreement as soon as possible after any such termination action to establish the basis for settlement of grant termination costs and the amount and date of payment of any sums due to either party.
>
> (d) In arriving at any amount due to the grantee under this clause, allowable costs shall be determined using those principals and procedures set forth in subpart 1-15.2 of the Federal Procurement Regulations.

In our opinion, the above quoted provision of Part E, Section 1(a) provides the basic authority under the grant agreement for termination of the grant to SAR. We believe that the language stating "the grantee agrees that the grant award official may, at any time after written notice and after opportunity for consultation has been afforded in the grantee, terminate the grant in whole or in part...," provides specific authority for unilateral termination of the grant for the convenience of the Government. We would add that termination of the grant agreement for the convenience of the Government is proper when the grant is terminated in the best interest of the Government.

We believe that the previously stated language also provides implicit authority for a termination of the grant by mutual consent of the parties. The words, "at any time...after opportunity for consultation has been afforded in the grantee" imply that consultation with the grantee should be pursued to promote an opportunity for a termination mutually acceptable to both parties. If no basis for termination can be mutually agreed to, the Government has the alternative to terminate for convenience or to terminate for good cause, if good cause exists.

Part E, Section 1(a), in conjunction with subsection 1(a)(1) above, provides express authority under the grant for "good cause." Particularly, Part E, subsection 1(a)(1) states that "a grant may be terminated by HUD for good cause subject to negotiation and payment of termination settlement costs." In this regard, a termination for good cause would require a finding by the grant officer of non-performance, on the part of the grantee, of work required under the grant agreement. If the grant officer made such a finding, after giving written notice to the grantee, and after opportunity for consultation has been afforded in the grantee, the grant officer could properly terminate the grant, in whole or in part, through a written termination notice specifying the effective date of the termination action.

Finally, pursuant to either form of termination authorized under the grant agreement, negotiation and payment of settlement costs would proceed consistent with the guidance provided at subsection 1(d) above, which states that allowable costs shall be determined by using those principals and procedures set forth in subpart 1-15.2 of the Federal Procurement Regulations. In finalizing termination proceedings, as indicated in subsection 1(a)(3) above, the grant award official and the grantee shall enter into a termination agreement as soon as possible after any such termination action to establish the basis for settlement of grant termination costs and the amount and date of payment of any sums due to either party consistent with the guidance provided at subsection 1(d).

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

Paul Feiner, Acting Regional Counsel, 3G

SEP 13 1979

Marilyn G. Wagner, Office of General Counsel, GF

Contribution of Personnel Paid by Grant from Federal Agency as Cooperating Party's Cost Share

This responds to your May 29 memorandum, in which you ask whether it is permissible, under §107(a)(8) of Title I of the Housing and Community Development Act of 1974, as amended, to count the value of services contributed by personnel paid by a grant from any Federal agency, including HUD, toward the contractor's share under a cost sharing contract. While your memorandum indicates that this issue arises in the context of a Federal contractual relationship, based upon follow-up conversations with your staff, it is our understanding that in fact a cooperative agreement was the instrument used in this instance to provide financial assistance under §107(a)(8). Upon a review of the facts and applicable requirements, we conclude that it is impermissible to count the contribution of Federally funded services towards the cooperating party's share of the costs of a cooperative agreement.

FACTS

Our understanding of the facts is as follows: Pursuant to the Secretary's authority under §107(a)(8) of the Housing and Community Development Act of 1974, 42 U.S.C. §5307(a)(8), to make grants "to states [or] units of local Government for the purpose of providing technical assistance in planning, developing, and administering assistance under this title," HUD entered into a cooperative agreement with a consortium (hereinafter the "cooperating party") of government agencies representing three states—Maryland, Virginia, and Delaware—for the purpose of training municipalities to prepare CDBG proposals. This project originated as an unsolicited proposal by the cooperating party, and the proposal contained a cost-sharing provision, i.e., that a certain portion of project expenses would be borne by the cooperating party. Accordingly, when the cooperative agreement was negotiated, the cover page of the final agreement indicated that the proposer would pay $40,000 of the total project costs of $136,437.00.

In performing its responsibilities under the cooperative agreement, the cooperating party used personnel whose salaries were paid by a grant from the Economic Development Administration (EDA), a Federal agency. The cooperating party, in seeking to meet its cost-sharing obligation, counted the EDA-funded services as an in-kind contribution toward its local share requirement of $40,000. Thus, a portion of the cooperating party's local share was in essence derived from a Federal source. Accordingly, you ask whether such an arrangement is permissible.

DISCUSSION

OMB OMB Circular A-102 (9/12/77) furnishes standards for Federal agencies "for establishing consistency and uniformity...in the administration of grants to State, local, and Federally recognized Indian tribal governments" and includes guidance concerning the source of cost-sharing contributions from grantees and cooperating parties. Although A-102 on its face applies only to Federal grants, both the legislative history of the Federal Grant and Cooperative Agreement Act, 41 U.S.C. §§501 *et. seq.*, and the OMB implementation of the same Act clarify that A-102 was meant to apply to cooperative agreements as well. In this regard, the Senate Report on the Act, S. Rep. No. 95-449, September 22, 1977, provides at page 23 that "[a] determination was made that the use of 'cooperative agreements' would not establish a class of nonprocurement transactions that would be exempt from OMB Circular A-102 or other circulars whose authority applies to assistance transactions." Further, the OMB Implementation of the Federal Grant and Cooperative Agreement Act, 43 F.R. 36860, August 18, 1978, provides, at subpart E: "Present administrative requirements such as OMB Circulars A-95, A-102 and A-110 apply to both grants and cooperative agreements involving the transfer of Federal funds." Accordingly, in this case we look to A-102 to determine whether a Federally-funded local share contribution is permissible.

Attachment F of A-102 sets forth the criteria and procedures for the allowability of cash and in-kind contributions made by grantees, subgrantees or third parties in satisfying cost sharing and matching requirements of Federal grantor agencies. Attachment F specifies at subpart 3(a)(3) that cost sharing encompasses "project costs represented by services...donated by other public agencies and institutions, and private organizations and individuals." Subpart 2(b) of Attachment F further provides that cost-sharing "represents that portion of project costs not borne by the Federal Government." In the situation you have presented to us, we do not believe that the services of personnel paid for by EDA could qualify as "cost-sharing because although their services may have been donated by public agencies, they do not qualify as "project costs not borne by the Federal Government."

The costs of these services obviously are borne by the Federal Government. Accordingly, in our view, it would be improper for the cooperating party to count EDA-funded personnel toward its cost-sharing amount under the cooperative agreement.

This conclusion is further reinforced by applying the definition of "in-kind contributions" in subpart (d) of Attachment F: "In-kind Contributions represent the value of noncash contributions provided by the grantee, and non-federal parties." (emphasis supplied) In our view, because of the fact that the salaries of the personnel in question were paid out of Federal funds, contribution of their services would not be a contribution of a non-federal party and hence, would not by definition be a valid "in-kind contribution" toward the cooperating party's share of the costs.

CONCLUSION

We conclude, based upon the foregoing, that in meeting its cost-sharing obligation under a cooperative agreement, a cooperative party may not count the value of services performed by individuals whose salaries are paid with Federal funds toward the cooperating party's share under a cost-sharing agreement.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

9 JUL 1979

Ronald A. Rash, Columbia Area Office

Marilyn G. Wagner, Office of General Counsel

Realtor's Activity During Debarment Period

You have asked whether the debarment of , who is presently employed as a realtor, would prohibit the sale of property personally owned by him when that sale would be financed through HUD. We concluded that such sales are generally prohibited, but if the sale is of a personal residence the debarment regulations are not deemed applicable.

Because of the benefit to the seller derived from the HUD financing there is sufficient contact between a seller and HUD under such a sale to constitute participation in HUD programs. Since participation by a debarred person or firm in all HUD programs is prohibited under 24 CFR § 24.4(a), such a sale would be prohibited by an individual such as , particularly in view of his status as a realtor. However, the debarment sanction is imposed to prevent business transactions with the debarred person or firm in order to protect the interests of HUD. Where the mere sale of a personal residence of a debarred individual is concerned, the risk to HUD is minimal. Further, the transaction is more a matter of personal convenience or necessity than the typical business transaction against which the debarment sanction ordinarily runs.

In addition, if the property is unique, HUD may want to waive the debarment sanction to prevent penalization of an innocent buyer.

Accordingly, if the sale proposed by is of his personal residence, the sale may be made to a buyer who would be financed by HUD. If the transaction is of a different nature, the debarment sanction is applicable unless waived and may not sell property to anyone who would be financed through HUD.

Marilyn G. Wagner

Acting Associate General Counsel
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Jon Will Pitts, Director, Office of Participation and Compliance — OCT 3 1979

Marilyn G. Wagner, Office of General Counsel

(Proposed Debarment)

At your request, we have reviewed the subject case again with particular attention to whether alleged purchase and rental of a distressed FHA-insured single-family property, application of rent proceed to his own use, and intentional failure to make any payments on the mortgage violated Section 239(b) of the National Housing Act or any other criminal statute. We have contacted Robert Hollister and discussed this question with him.

I. Statutory Violations

In our opinion, has not violated Section 239(b) of the National Housing Act because this statute does not apply to single-family transactions. Section 239(b) explicitly refers to conduct on the part of an owner of a property which is security for a mortgage described in Section 239(a). The latter section refers solely to "any mortgage covering multifamily housing".

Our conclusion is buttressed by the fact that in 1970, two years after the enactment of Section 239(b), Congress enacted Section 912 of the Housing and Urban Development Act of 1970 which specifically addressed the practice of "equity skimming" (i.e. purchasing one-to-four family dwellings subject to FHA-insured or VA loans and applying the rents to one's own use instead of making payments on such loans). This statute explicitly excludes from its coverage the purchaser of only one single-family dwelling which is subject to a loan in default at the time of purchase or within one year thereafter. The statute prohibits a "pattern or practice" of "equity skimming" rather than an isolated instance thereof. Since purchased only one single-family dwelling and has not engaged in a pattern of equity skimming, he has not violated this statute.

II. Regulatory Violations

Congress' exclusion of a single instance of "equity skimming" from the criminal penalties of Section 912 of the HUD Act was not in any way intended to imply that such conduct is responsible. This is confirmed by the legislative history of the statute which establishes that the exclusion was adopted for the protection of those who purchase *in good faith* a single-family dwelling subject to an FHA-insured or VA loan.

"Equity skimming" adversely affects the financial position of the Department in at least two ways. First, it hastens or leads to foreclosure which, in turn, necessitates the payment of mortgage insurance benefits by HUD to the mortgagee. Additionally, the Department incurs holding costs until such time as the property can be resold. Second, "equity skimming" results in a lack of attention to the physical condition of the property. The condition of the property affects its value which, in turn, affects the Department's ability to recoup its losses through resale after foreclosure.

We must consider, however, whether this type of irresponsible conduct is cause for debarment under 24 CFR § 24.6(a). The nine specific causes for debarment do not cover this conduct. § 24.6(a)(4) provides:

> (a) Causes. . . . (4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

At the outset, we note the doctrine of *ejusdem generis*, a rule of statutory construction which states that, where general words follow an enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.17 (4th ed. 1974); 82 C.J.S. Statutes § 332b, at 658 (1953). While this doctrine is most commonly invoked in the interpretation of statutes, it has been applied in other contexts such as the interpretation of contracts. *Badgett Mine Strip Corporation* v. *Pennsylvania Turnpike Commission*, 173 F. Supp. 425 (M.D. Pa. 1959). The doctrine also has been utilized in the interpretation of a general, catchall cause for an administrative sanction preceded by a list of specific causes. *See diLeo* v. *Greenfield*, 541 F.2d 949, 954 (2d Cir. 1976) ("other due and sufficient cause" for dismissal of teacher).

Under this doctrine, the words "any other" following an enumeration of particular classes of persons or things should be read to include only others *of like kind or character*. *See*, *e.g.*, *Badgett Mine Strip Corporation* v. *Pennsylvania Turnpike Commission*, 173 F. Supp. 425, 427 (M.D. Pa. 1959); *Keenan* v. *Bowers*, 91 F. Supp. 771, 773 (E.D.S.C. 1950);

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Ruth v. Pacific Gas Electric Company, 23 Cal. App. 3d 819, 100 Cal. Rptr. 501, (1972); Application of Bowen, 230 N.Y.S. 2d 578, 580, 17 A.D.2d 12 (1962), affirmed, 191 N.E.2d 468, 13 N.Y. 2d 663 240 N.Y.S. 2d 991 (1963).

If applied to § 24.6(a)(4), therefore, the rule would limit its scope to causes of a like kind or character with the three preceding causes for debarment. Subsections (1), (2), and (3) of § 24.6(a) are concerned with the conduct of contractors relative to the solicitation, award, and performance of contracts. Since the practice of "equity skimming" is unrelated thereto, it would not be cause for debarment under § 24.6(a)(4).

The ejusdem generis doctrine, however, does not apply where there is a clearly manifested intent that the general term be given a broader meaning than the doctrine requires. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.22(4th ed. 1974). See, e.g., United States v. Alpers, 338 U.S. 680 (1950); United States v. Baranaski, 484 F.2d 556 (7th Cir. 1973). If the meaning of the words used in a regulation is in doubt, great deference is accorded the interpretation given the regulation by the officers or agency charged with its administration unless it is plainly erroneous or inconsistent with the terms of the regulation. INS v. Stanisic, 395 U.S. 62 (1969); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 276 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). To sustain an administrative interpretation of a regulation, it is not necessary to find that the agency construction is the only reasonable one. JNO. McCall Coal Co. v. United States, 374 F.2d 689, 691 (4th Cir. 1967); Saracena v. United States, 508 F.2d 1333, 1335-36 (Ct. Cl. 1975). This is particularly so where there has been a long continued administrative interpretation of a regulation. Lindsey v. United States, 214 Ct. Cl. 574 (1977); Kantor v. United States, 205 Ct. Cl. 1, 7 (1974).

In this regard, the Department historically has interpreted § 24.6(a)(4) more broadly than the doctrine of ejusdem generis would permit. This subsection has been construed to be sufficiently broad to include the grounds for debarment which precede it, and those which follow it. Leonard E. Briscoe, et al., Docket No. 76-435-DB (1977) (Subsection (a)(3)(ii)); W. P. Cherry, Jr., 77-HUD(JD)-45 (Subsections (a)(5) & (6)); Irving T. Nelson and Thomas J. Sedgewick, 77-HUD(JD)-48 (Subsection (a)(9)); William C. Shannon, 77-HUD(JD)-51 (same). In fact, § 24.6(a)(4) has been consistently interpreted to include any conduct which demonstrates either a lack of integrity or ability to complete performance on a contract. Lewis Weinstein, Docket No. 78-426-DB (1978); Leonard E. Briscoe, et al., supra.

In our opinion, therefore, the prior administrative interpretation of § 24.6(a)(4) is consistent with the conclusion that "equity skimming" be included as a cause for debarment.

III. Contractor or Grantee Status As a Result of Purchase of a Property Subject to An FHA Mortgage

In addition to the existence of cause for debarment, however, it must also be shown that is a contractor or grantee within the meaning of 24 CFR § 24.4(f), which defines the phrase "contractors or grantees" as follows:

> (f) "Contractors or grantees".
> Individuals, state and local governments and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, borrowers, builders, mortgagees, real estate agents and brokers, area management brokers, management and marketing agents, or those in a business relationship with such recipients including, but not limited to, consultants, architects, engineers and attorneys; all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors.

In determining whether, by virtue of his purchase of a property subject to an FHA-insured mortgage, is a "contractor" or "grantee" under the above definition, it is significant that he did not enter into an agreement with the mortgagee to assume the loan. In fact, the mortgagee was not even notified of the purchase. Since did not receive, directly or indirectly, any HUD funds as a result of the transaction, the first and third parts of the definition are clearly inapplicable to him. The second part of the definition refers to "contractors with participants" in programs where HUD is the guarantor or insurer. Broadly construed, this would include any contract relating to a property subject to an FHA-insured mortgage regardless of whether the contractor receives any funds as a result of HUD's insurance commitment.

The purpose of debarment, however, is limited to protecting the public from persons who present a threat to the efficient use of funds entrusted to them pursuant to a grant or contract. The sanction is focused upon persons who are recipients of Department funds. In our opinion, therefore, the phrase "contractors with participants" means persons to whom HUD funds are passed through as a result of contracts with program participants rather than persons, such as , who expend private funds in connection with the purchase of property subject to a HUD-insured mortgage. Examples of the former would be persons who contract with mortgagors for the sale, rehabilitation, or repair of properties where the consideration for the property, labor, or materials is paid with proceeds of loans which are a product of HUD insurance.

This interpretation of the phrase "contractors with participants" is also suggested by the language which precedes and follows it. As indicated above, the first and third parts of the definition of "contractors or grantees" refer to "recipients" of funds and "Federally assisted" contractors. Therefore, the seond part of the definition is restricted by this context to contractors who are indirect recipients of funds occasioned by HUD insured loans.

Since purchase of a property subject to an FHA-insured mortgage may not serve as the basis for establishing that he is a contractor or grantee, debarment would be improper unless another basis exists therefor.

IV. Contractor or Grantee Status, Sales Commission

Report of Investigation dated July 14, 1977, indicates that, in August 1975, purchased a HUD-owned single-family property on a direct-all-cash basis. The Standard Retail Sales Contract, dated August 11, 1975, contains the signature of an " " as broker. However, the broker for the transaction was in fact who, with knowledge, forged the signature of As of August 11, 1975, was debarred from participating in HUD programs (See In the Matter of Real Estate, Docket No. (June 19, 1975)). HUD paid a $100.00 sales commission which was received by and, pursuant to an agreement between and paid one half of the commission to

One who purchases a HUD-owned property on a direct-all-cash basis is not a contractor or grantee within the meaning of 24 CFR § 24.4(f) (See In the Matter of , Docket No. , Memorandum dated July 2, 1979 from Marilyn G. Wagner to Lawrence B. Simons (Settlement Recommendation and Discussion). However, in this case, received a portion of the sales commission paid by the Department.

The definition of contractors or grantees includes "individuals...that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including...real estate agents and brokers..." 24 CFR 24.4(f). In our opinion, actual payment of a portion of the commission to makes him a recipient of HUD funds within the scope of the debarment regulations. was in fact acting as a broker and received funds and is through that relationship with HUD, rather than his status as an direct-all-cash buyer, that he can be found to be a contractor or grantee.

Although this contract was induced through a deception without which it would not have been entered into by HUD, HUD funds were expended pursuant to the contract. The fact that the forgery could be a basis for having the contract declared void ab initio does not alter the fact that was in fact a "recipient" of HUD funds. By determining that was a contractor or grantee in the highly specialized meaning of those terms as defined in 24 CFR 24.4(f), the Department in no way validates the fraudulent transaction.

The record in this case also discloses that, in May 1976, and fraudulently concealed their participation as brokers in three unsuccessful offers to purchase HUD-owned properties on a direct-all-cash-basis. Thus, there is evidence that the deception is not an isolated one, and that there is a threat of future repetition.

We wish to bring one further matter to your attention at this time. This concerns the lack of record support for the "equity skimming" charge set out in the draft debarment letter originally prepared by your office. The evidence of record for the charge consists of a two-page synopsis of an FBI investigative report contained in our OIG files dated July 12, 1978). This is not sufficient to warrant the commencement of debarment proceedings.

In future, you should obtain the following evidence for each property involved before charging an individual with "equity skimming":

(1) The FHA case file showing insured status of the property;

(2) Contract of purchase from the mortgagor and documents showing transfer of title;

(3) Records of default and foreclosure proceedings;

(4) The rental agreement between the tenant and the alleged equity skimmer;

(5) Rental receipts and/or cancelled checks showing payment of rent by the tenant,

(6) A statement from the mortgagee that (a) mortgage payments were not paid to the mortgagee during the period that rents were collected or, if payments were made, they were insignificant when compared with the rental payments and (b) the failure to make mortgage payments was not condoned or otherwise waived by the mortgagee.

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In view of our discussion and opinions herein, please disregard, in its entirety, our memorandum of July 6, 1979 and redrafted debarment letter attached thereto regarding the subject individual.

Marilyn G. Wagner

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Attachment

Jon Will Pitts, Participation and
Compliance Division, HAC

OCT 3 1979

Marilyn G. Wagner, Office of General Counsel, GP

(Proposed Debarment)

At your request, we have reviewed the subject case again. We conclude that the proposed debarment of is appropriate. In reaching this conclusion, we considered three issues: (1) whether is a contractor or grantee within the meaning of 24 CFR 24.4(f), (2) whether the conviction for violation of 21 U.S.C. §§841 and 848 constitutes cause for debarment within the meaning of 24 CFR §24.6(a), and (3) whether the period for which the debarment is proposed is reasonable as required by 24 CFR 24.4(a).

A. Whether is a contractor or grantee?

The record indicates that has participated in at least two HUD-insured multifamily projects as limited partner: Erie Square No. 1, Ltd. Cleveland, Ohio, (FHA Project No. 042-35162) (39 percent interest) and Oakwood Apartments, Ltd., Detroit, Michigan (Project No. 044-35276 PM) (90 percent interest). As a participant in a program in which HUD is the insurer, is a "contractor or grantee" within the meaning of 24 CFR §24.4(f).

B. Whether a conviction for violation of 21 USC §§841 and 848 constitutes cause for debarment?

On January 19, 1978, was convicted by the U. S. District Court for the Southern District of New York of unlawfully, willfully, intentionally, and knowingly engaging in a continuing criminal enterprise by unlawfully, willfully, intentionally, and knowingly distributing and possessing with intent to distribute a Schedule I narcotic drug controlled substance (heroin) in violation of 21 USC §§841(a)(1), 841(b)(1)(A), 812 and 848 and 18 USC §2. was sentenced to imprisonment for the rest of his natural life and a fine of $100,000.00 for the violation of 21 USC 848, which relates to engaging in a continuing criminal enterprise, and 15 years imprisonment and a fine of $25,000.00 for the violation of 21 USC §841 which relates to the distribution of a controlled substance. He was also placed on Special Parole for the rest of his natural life on the latter offense. The sentences were the maximum sentences permissible for each offense.

24 CFR §24.0 provides that "it is necessary that grants and contracts awarded by the Department and by those entities with whom it does business be made only to those contractors and grantees which can demonstrate that Government funds will be properly utilized. Department policy requires, therefore, that awards be made only to responsible contractors and grantees." (Emphasis added). 24 CFR §24.5(a) provides that the administrative sanctions which are the subject of 24 CFR Part 24, including debarment, "shall be used for the purpose of protecting the public and are not for punitive purposes."

In keeping with the foregoing expression of policy, the causes for debarment include the following:

> Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment. [24 CFR §24.6(a)(4)]
>
> Conviction under the Organized Crime Control Act of 1970, 18 USC 1961 et seq. or conviction for the commission of the offense of embezzelment, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with the commission of such offenses, or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility. [24 CFR §24.6(a)(9)] (Emphasis added).

Applicability of 24 CFR §24.6(a)(9)

The offenses referred to at 21 USC §841 and 848 are not among those specifically listed in §24.6(a)(9). Hence, to be included among the offenses referenced therein as cause for debarment, it must be said that the offenses prescribed at 21 USC §§841 and 848 fall within the sweep of the general words "any other offense indicating a lack of business integrity or honesty."

As an aid to interpreting said phrase, we note the doctrine of ejusdem generis, a rule of statutory construction which provides that, where general words follow an enumeration of particular classes or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 2A SUTHERLAND, STATUTORY CONSTRUCTION §47.17 (4th ed. 1974); 82 C.J.S. Statutes §332b, at 658 (1953). Under this doctrine, the words "any other" following an enumeration of particular classes of persons or things should be read to include only others of like kind or character. See, e.g., Badgett Mine Strip Corporation v. Pennsylvania Turnpike Commission, 173 F. Supp. 425 (M.D. Pa. 1959); Keenan v. Bowers, 91 F. Supp. 771, 773 (E.D. S.C. 1950).

By its explicit inclusion in §24.6(a)(9), a conviction under the Organized Crime Control Act of 1970 (18 USC §§1961 et seq.) is a conviction for an offense that indicates "a lack of business integrity or honesty." Thus, under the ejusdem generis doctrine, any offense of like kind or character with that included under the Organized Crime Control Act of 1970 would be cause for debarment under §24.6(a)(9).

18 USC §1962(a) provides, in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity. . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"Racketeering activity" is defined to include, inter alia, "dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year" and "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." (Emphasis added). 18 USC §1961(1)(A) and (D). A "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 USC §1961 (5).

21 USC §848(b) provides that "a person is engaged in a continuing criminal enterprise if

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

"Chapter", as used therein, refers to chapter 13 of Title 21, USC, the subject of which is the control and prevention of drug abuse offenses. 21 USC §848 was enacted contemporaneously with 18 USC §§1961 *et seq*.

In our opinion, the offense of engaging in a continuing criminal enterprise is an offense of like kind or character with the offense at 18 USC §1962. Each offense relates to involvement with narcotic drugs as a profit-making venture. 21 USC §848 prohibits the venture itself. 18 USC §1962 proscribes the investment of income derived from the venture in a legitimate business enterprise. The penalties for the offenses are equally severe, indicating the seriousness with which they are viewed. In fact, the maximum penalty for a violation of 21 USC §848 greatly exceeds that provided for a violation of 18 USC §1962 (life imprisonment and $100,000.00 fine for the former and 20 years imprisonment and $25,000.00 fine for the latter. *See* 18 USC §1963(a).

For the reasons stated above, in our opinion, a violation of 21 USC §841 is also an offense within the meaning of §24.6(a)(9). 21 USC §841 relates to dealing in narcotic drugs and the penalty prescribed therefor is on a par with the penalty provided for a violation of 18 USC §1962. Moreover, the conviction for violating 21 USC §848 indicates that the violation of 21 USC §841 was part of a heavy involvement in a large drug enterprise rather than an isolated incident.

Applicability of 24 CFR §24.6(a)(4)

Since §24.6(a)(4), the general cause for debarment, has been construed to include the causes set forth at §24.6(a)(9), a conviction for a violation of 21 USC §§841 and 848 is also cause for debarment under this subsection. *See* *Irving T. Nelson and Thomas J. Sedgewick*, 77-HUD(JD)-48; *William C. Shannon*, 77-HUD(JD)-51.

CAVEAT: While, in our opinion, violations of 21 USC §841 and 848 are cause for debarment under 24 CFR §24.6(a)(4) and (9), we hasten to add that not every drug abuse offense automatically warrants debarment. A conviction for an offense of simple possession or use of an illicit drug, without more, does not warrant debarment. In such a case, it would be necessary to look behind the conviction to the circumstances surrounding the commission of the offense for evidence suggesting a lack of responsibility (ie., evidence of drug addiction or dependence or evidence of large-scale dealing in illicit drugs in cases where, for example, the conviction is the result of an agreement to plead to a lesser included offense such as simple possession or use. Cf. *Young* v. *Hampton*, 566 F. 2d 1253 (7th Cir. 1977) (Conviction for possession of marijuana, amphetamines, barbituates, and MDA, a felony under State law, insufficient to warrant removal of Government employee from the federal service where offense occured while off-duty at employee's private residence and no evidence was adduced tending to show that drug abuse interfered with employee's job performance). Moreover, even in the case of a conviction for drug transfer, distribution, or sale, a distinction should perhaps be drawn between an isolated instance of same and traffiking. Thus, it would be necessary to look beyond the conviction to the circumstances of such offenses. Cf. *Grebosz* v. *U.S. Civil Service Comm'n and U.S. Postal Service* ________ F. Supp. ________, No. 76 Civ. 1311 (CHT) (U.S.D.C., S.D.N.Y., June 18, 1979)(Conviction for sale of cocaine by Government employee, while off-duty, insufficient to warrant removal from federal service where the sale was an isolated transaction involving a small amount of drugs).

C. *Whether the period for which the debarment is proposed is appropriate?*

Debarment has been proposed for an indefinite period of not less than five (5) years. 24 CFR §24.4(a) provides that debarment shall be for a "reasonable, specified period of time commensurate with the seriousness of the offense. . . generally not to exceed five years. However, the hearing officer may exclude a party for an indefinite period because of egregious and willful improper conduct." The phrase "seriousness of the offense" contemplates an evaluation of the following factors: (1) aggravated nature of the acts involved, (2) indication of a pattern or practice, (3) evidence of proclivity, (4) presence of intent to defraud the public or government, (5) the seriousness with which the court regarded the criminal offense, and (6) evidence of extenuating or mitigating circumstances. *In the Matter of ________________ Real Estate*, 75-HUD (JD)-5. "Egregiousness" has been defined as "outstanding for undesirable qualities; remarkably bad; flagrant." Webster's New World Dictionary, Second College Edition (1970). "Willful" means "intending the result of which comes to pass; designed; intentional; not accidental or involuntary." Black's Law Dictionary, Revised Fourth Edition (1968).

In our opinion, considering the aggravated nature of the acts involved, the indication of a pattern or practice of engaging in the proscribed activity, and the severity of the sentences imposed by the federal district court, which indicate the seriousness with which the court regarded the offenses, conduct can fairly be said to be both egregious and willful within the meaning of 24 CFR 24.4(a) and, therefore, warrants debarment for an indefinite period of time.

Finally, we note that, in the routing slip which accompanied the proposed debarment letter, Mr. deLaubenfels of your staff indicated that, since the conviction is not "HUD-related," 24 CFR §24.6(a)(4) was cited as the cause for debarment. As indicated hereinabove, 24 CFR §24.6(a)(9), in addition to 24 CFR §24.6(a)(4), includes convictions for offenses unrelated to programs of this Department. Therefore, you should amend your proposed debarment letter to include both subsections as reasons for debarment. We agree, however, that, 24 CFR §24.5 entitles to an oral hearing if he so elects.

Deputy Associate General Counsel
Finance and Administrative Law
Division

Paul Williams, Director, Office of
Management, HA

OCT 4 1979

Irving P. Margulies, Office of General Counsel, GF

Agreements Between the Assistant Secretary and Subjects of Proposed Debarment Action

This responds to your memorandum to me dated September 11, 1979, regarding the captioned matter. The questions raised in your memorandum are responded to below:

Question:

1. Subsequent to the dismissal of the hearing should the Assistant Secretary for Housing issue an Order of Final Determination of Debarment or does his signature on the Agreement constitute such an Order?

Answer:

I understand that your office generally does not issue an Order of Final Determination of Debarment in instances where a Hearing Officer has issued a determination and Order. There appears to be no reason for doing so simply because the Hearing Officer's Order is based upon a Consent Agreement which has been incorporated into the record. The party affected is well aware of the terms of the debarment since he has signed the Agreement. Further, the Hearing Officer's Order of Dismissal which is based upon the Agreement usually specifically references the term of debarment (See, for example, the Order of Dismissal dated August 29, 1979, in the Matter of , which is attached to your memorandum). Once the Agreement is signed, it becomes controlling as to the commencement and other terms of the debarment.

Question:

2.a. Under the terms of an Agreement when the subject becomes qualified for the removal of the debarment sanction who should verify that qualification and issue a Reinstatement Order?

Answer:

I understand that your office generally does not issue a Reinstatement Order when the period of an imposed debarment has run. There appears to be no reason to issue such an Order simply because the debarment period was imposed under the terms of an Agreement, unless the Agreement otherwise provides.

Question:

2.b. Does the dismissal with prejudice in any way hinder a Hearing Officer from participating in the matter again?

Answer:

A dismissal with prejudice does not in any way disqualify a Hearing Officer from further participation in the matter. Rather, it would disqualify the affected party from bringing the same action again before any Hearing Officer. However, since the dismissal is based upon an Agreement, a breach of the Agreement could conceivably resurrect the action. Further, the Agreement might under its terms provide for a subsequent review of the party's responsibility by the Hearing Officer in order to determine whether reinstatement is appropriate.

Question:

2.c. Is it the intention of the Regulations to involve Hearing Officers in the process of Agreements between the Assistant Secretary and subjects?

Answer:

Yes. Under 24 CFR Section 24.9(a) the Hearing Officer has the power to "hold conferences to settle...and to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion;". Once a Hearing Officer has obtained jurisdiction of an appeal, the appeal cannot be dismissed or settled without an Order by that Hearing Officer. Of course, the Assistant Secretary and a party may enter into a Consent Agreement without the intervention of a Hearing Officer at any time prior to the Hearing Officer's acceptance of jurisdiction of the appeal.

Question:

2.d. Is the Assistant Secretary prohibited by the Regulations from involvement in the reinstatement process (in the case of suspension and debarment)? Is the Assistant Secretary only charged with "responsibility" for the reinstatement process?

Answer:

No. Under 24 CFR Section 24.11(d), the Hearing Officer submits a recommendation concerning reinstatement. The subsection then provides that "the appropriate Field Officer and Assistant Secretary shall confer with regard to the merits of reinstatement. If there is disagreement between the Assistant Secretary and the Field Officer, the issue shall be referred to the Secretary for final resolution of the request for reinstatement."

With specific regard to the Matter of , supra, your memorandum inquires whether the have been notified of their debarment by receipt of the Order of Dismissal. The answer is yes. Your memorandum further inquires as to "the process you would advise we follow if and when they satisfy the requirements for removal of debarment and apply for reinstatement".

The Consent Agreement entered into between the and Assistant Secretary Simons, dated August 2, 1979, provides that "the will be debarred from participation in all HUD programs in accordance with 24 CFR Part 24 commencing from the date of the letter of temporary denial of participation, January 16, 1978, and continuing for five years, to January 15, 1983. However, the debarment will terminate as soon as the HUD mortgage is paid in full and the contractors are satisfied if such action occurs before January 15, 1983." These terms are clear and self-effectuating. We see no need either for an application for reinstatement once the specified debarment period has been concluded or for the issuance of a letter granting reinstatement.

Marilyn G. Wagner

Associate General Counsel
Finance and Administrative
Law Division

OCT 11 1979

Jon Will Pitts, Director, Office of
Participation and Compliance, HAC

Marilyn G. Wagner, Office of General Counsel, GF

Clarification of Causes for Debarment Under 24 CFR Part 24

This responds to your oral request for clarification of whether violations or offenses which do not involve HUD may be used as bases for debarment under 24 CFR Section 24.6.

While some of the causes specified in Section 24.6 relate solely to actions involving HUD (e.g., Subsection (a)(6), "Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department"), other causes, on their face, need not be based upon actions involving the Department (e.g., Subsection (a)(9), "Conviction under the Organized Crime Control Act of 1970, 18 U.S.C. 1961 et seq. or conviction for the commission of the offense of embezzlement...", etc.). Similarly, Subsection (a)(4), "Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment", in no way implies that the cause need arise from an act involving the Department.

The Section, however, makes clear that regardless of whether the cause involves the Department, only a "contractor or grantee" may be debarred under the regulations. In instances where a cause does not involve HUD, some other nexus must exist with the Department which would make the party to be debarred a contractor or grantee within the meaning of Section 24.4(f). In this regard, our administrative judges have indicated that under the language of the present regulations, the Department must show that a party has, either presently or in the recent past, participated in HUD programs in order to prove contractor or grantee status. See Seymour Newman and Kilmer Realty Co., HUD Docket No. 78-567-DB. As you know, we have proposed language which would broaden the definition of contractors and grantees to include those who, by reason of position or past history, are likely to participate in HUD programs.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law Division

DEC 5 1979

Marvin R. Lerman, Boston Regional
Office, 1G

Marilyn G. Wagner, Office of General Counsel, GF

Proposed Temporary Denial of Participation (TDP)
under 24 C.F.R. Part 24 of Section 8 Existing
Tenant and Landlord

This responds to your memorandum requesting our comments with respect to a proposed temporary denial of participation (TDP) of a tenant and landlord under the Section 8 program by the Hartford Area Office. For the purpose of this memorandum, we assume the truth of the allegation that the landlord and tenant made statements in a rental agreement as to the amount of the rent which were false in view of an undisclosed, oral agreement contemporaneous with the rental agreement for a rental figure which exceeded that expressed in the rental agreement. Also, we assume that the rental agreement was material to the Department's determination of the amount of the housing assistance payment, including the determination of fair market rent. Our comments with respect to the proposed action follow:

1. In our opinion, the tenant is not a contractor or grantee within the meaning of 24 C.F.R.§ 24.4(f) because the tenant is an ultimate beneficiary of the program in which the fraud occurred. The administrative sanctions provided for in 24 C.F.R. Part 24 are not addressed to ultimate beneficiaries of Department programs and activities. Compare 24 C.F.R. Part 1 where, in the case of Title VI sanctions, a similar distinction is expressly drawn between a recipient of Federal financial assistance and the ultimate beneficiary of a Department program or activity (24 C.F.R. §1.2(f)). Thus, the tenant is not subject to any of the administrative sanctions of 24 C.F.R. Part 24 including TDP.

2. In our opinion, the landlord is a contractor or grantee within the meaning of 24 C.F.R. § 24.4(f). Additionally, the facts are cause for the imposition of a TDP. 24 C.F.R. 24.18(a)(2)(ii). They are also grounds for debarment. See 24 C.F.R. § 24.6(a)(4) and (6).

3. The purpose of a TDP is to permit the Department to take immediate steps to protect the public interest in situations that can be fairly characterized as an emergency. It is a temporary measure which normally should be coupled with a recommendation for debarment.

4. If the landlord against whom the TDP is proposed owns a significant amount of the available rental units within the geographical area of the Hartford Area Office, a debarment or TDP may adversely affect prospective tenants eligible for housing assistance payments. Hence, the imposition of a debarment or TDP against the landlord may not be in the best interests of the Government. Cf 24 C.F.R. § 24.18(a)(3)(ii).

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

NOV 27 1979

MEMORANDUM TO: Robert C. Embry, Jr., Assistant Secretary
for Community Planning and
Development

FROM : Jane McGrew SIGNED

SUBJECT : Targeting DOE Procurements to Distressed
Cities

I. Introduction

This responds to your request for our opinion on the legality of a contemplated procurement program, which is intended to target DOE procurements to distressed cities or pockets of poverty (as defined by this Department), pursuant to a Memorandum of Understanding between this Department and the Department of Energy.

This Department and the Department of Energy are presently considering entering into a Memorandum of Understanding (hereinafter the Memorandum). The Memorandum would provide a method for targeting large DOE research, development and demonstration procurements to firms located in distressed cities by awarding evaluation points to proposers who are willing to locate substantial activities under the contract in distressed areas. The targeting is intended to attract procurement activity to areas of high unemployment, underemployment and labor surplus areas, to assist businesses in these areas and otherwise to help alleviate economic and physical deterioration in these areas.

Based upon our review of the procurement program and applicable law, it is our opinion that a program of the type outlined in the attached Memorandum is legally permissible for the reasons discussed below.

II. Discussion

A. Authority Under Case Law For a Non-Technical Factor For Award

In considering the Government's legal authority to prescribe the manner in which it will contract for goods and services, the settled principle laid down by the Supreme Court in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940), applies:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

It has, in fact, been held that the Government may impose social and economic factors, unrelated to either technical quality or cost, as conditions upon Federal procurements. Thus, while the usual rule of Government procurement is to obtain the goods or services required by the Government at the lowest price from a responsive, responsible contractor, there are several well-recognized modifications to this basic principle which are founded upon Government expressions of national economic or social policy such as affirmative action, labor surplus priorities, small business preferences and "Buy American" requirements.

The utilization of Federal procurement as an instrument of social policy, specifically in the field of civil rights, was scrutinized in *The Contractors Association of Eastern Pennsylvania v. The Secretary of Labor*, 311 F. Supp. 1002 (E.D. Penna. 1970), aff'd, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971). Here, the Court examined the propriety of conditioning Federal procurements and the release of Federal funds for construction on the implementation by contractors of the "Philadelphia Plan", promulgated by the Secretary of Labor pursuant to Executive Order 11246. The plaintiffs sought to invalidate the affirmative action requirements contained in the "Philadelphia Plan" and the Executive Order. Failure to comply with these requirements could result in termination of contracts and the debarment of a contractor from further government contracts.

The district court, later sustained by the Third Circuit, rejected the plaintiffs' statutory and constitutional arguments and held that the Executive Order was consistent with the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §486 as well as the Constitution. The Court expressed the view that the Federal Government could properly impose its terms and conditions on contractors in a defined procurement area and that such conditions could legitimately reflect matters of social concern which have been formally expressed by the President and which are not in conflict with statute. In this case, the Third Circuit also found that the Government had a strong interest in increasing the labor pool for Federal contracts and federally assisted contracts and that the requirements at issue would serve that interest.

The integration of social policy with procurement practices was also addressed in the *Matter of American Can Company*, B-187381, B-187658, March 17, 1977 (77-1 CPD ¶ 196), where the Comptroller General considered the propriety of a General Services Administration (GSA) solicitation which involved a clear departure from ordinary procurement principles. To deal with the problem of solid waste disposal, a matter of stated national social policy, the GSA solicited bids for paper products and required that a given percentage of the products be manufactured from recycled paper. The solicitation specified that a bid which did not certify the products as recycled would be rejected as nonresponsive notwithstanding the fact that such recycling requirements had "nothing whatever to do with the use, performance or quality characteristics of the product." Id. at 2. The protester, American Can Company, alleged that the recycling requirement constituted an unnecessary limitation in the solicitation and would unduly restrict competition and increase the cost to the Government.

In discussing the issue of policy and procurement, the Comptroller General took cognizance of the fact "...that social programs may be effectuated through Federal procurement," citing the Buy American Act, 41 U.S.C. §10a-d (1970) and Fair Labor Standards Act of 1938, 29 U.S.C. §§201-219 (1970). Id. He rejected the protester's contention that "...express statutory authority is required to exempt agencies from the basic statutory requirement that specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of the types of property and services necessary to meet the requirements of the agency concerned." Instead, the Comptroller General concluded, the General Accounting Office does "...not believe the absence of express statutory authority is controlling on the issue." Id. at 4. The Comptroller General reasoned that ordinarily "Federal agencies must buy from the source that satisfies the Government's needs at the lowest price" and that "the inclusion in a solicitation of terms and conditions which may tend to lessen competition or increase the probable cost to the Government is improper." However, as an exception to this general rule, the Comptroller General stated that "terms and conditions, although not specifically authorized or required by statute," are proper if they "reasonably implement a public policy embodied in a statute". Id. at 4. He also indicated that executive orders and other directives or statements regarding such policies could serve as bases for the imposition of procurement requirements.

The Comptroller General had previously considered the implementation of social policy through negotiated procurements, in a decision to the National Aeronautics and Space Administration (NASA) concerning a protest by the RCA Service Company (RCA). 51 Comp. Gen. 272 (1971). In this case, NASA had advised offerors that special consideration would be given to proposals containing firm commitments to contract with small business subcontractors or minority-owned enterprises. As a result, the contract was awarded pursuant to a negotiated procurement, to a firm, Hayes, which scored lower than RCA on all technical selection criteria but which had substantial commitments to contract with minority-owned enterprises.

The Comptroller General accepted NASA's use of non-technical factors as selection criteria in this procurement to address the economic and social problems facing small businesses and minority firms. However, he expressed concern that the weight to be given to the non-technical factors should have been more clearly expressed by NASA in the procurement solicitation document, inasmuch as "...it is apparent that technical approach was not considered to be of paramount importance in determining the successful offeror, since it is admitted that Hayes was relatively weak in the telecommunications area." Id. at p.282. Notwithstanding this criticism, the Comptroller General upheld the award to Hayes, thus permitting the non-technical selection factor - extent of minority subcontracting - to be dispositive. Thus, the Hayes case provides authority for including non-technical evaluation factors in Federal procurements as a method of implementing social policy and for selecting even a technically inferior proposal which incorporates stronger non-technical features.

B. Authority For a Distressed Cities Factor For Award

In view of the foregoing decisions, we believe that public policy pronouncements in the statutes relating to housing and community development and small business concerns, national urban policy, and government policy concerning labor surplus areas support the award of points to firms which will perform substantial activities under government contracts in distressed cities.

1. Housing and Community Development Legislation

In enacting the Housing and Community Development Act of 1974, P.L. 89-174, 79 Stat. 667 and 42 U.S.C. 3531, the Congress found that the nation's urban communities "face critical social, economic, and environmental problems" largely caused by population growth, "the concentration of persons of lower income in central cities" and "inadequate public and private investment in housing and other physical facilities." §101(a).

On this basis, the Congress declared that "systematic and sustained action by Federal, State, and local governments to eliminate blight, to conserve and renew older urban areas" was essential to maintain viable urban communities and called for "substantial expansion of...the scope and level of Federal assistance together with increased private investment in support of community development activities." §101(b).

One means of assuring this expansion of investment and increased Federal assistance is to establish a procurement preference for location of activities in the nation's distressed cities. Such a priority would be an example of the "systematic and sustained action by the Federal government, to eliminate blight, to conserve and renew older urban areas" contemplated and required by this Act.

The Congressional commitment to relief for distressed cities is most pointedly made in §119(a) of the Housing and Community Development Act of 1977 which authorizes the HUD Secretary to make Urban Development Action Grants (UDAG) to severely distressed cities and urban counties. Grants made under this authority are intended to supplement "other forms of Federal assistance" for the support of distressed cities.

Targeting procurements to distressed cities would be an appropriate response to this legislative mandate to increase assistance to these communities, particularly when this is done in tandem with the grant activities contemplated by this statute. Procurements can thus provide additional Federal leverage to attract investment into distressed cities and thus to arrest and reverse the process of economic deterioration.

By stimulating private investment in distressed cities, targeted procurement would directly serve the objective of the 1977 Act respecting distressed cities. As explained in the House Report on the Act, H.R. Rep. No. 634, 95th Cong., 1st Sess. 9(1955):

> Only the showing of a significant influx (or reinvestment) of private capital can counter the image of decline [in distressed cities]. Recent experience in a number of cities has shown that such an influx in the form of a critical project or set of activities can turn around the perception of the private sector about the desirability of the investment climate. When this perception changes, the private sector chooses to invest substantial amounts of funds in the city rebuilding process without additional public subsidy.

Significantly, procurement targeting would channel private investment into distressed cities without public subsidy. When accomplished in conjunction with a UDAG, the procurement dollars would actually enhance the potential of the grant money. Thus, the purposes of both the 1974 and 1977 Acts would be well served.

2. National Urban Policy

In accordance with Sections 702 and 703(a) of the Nationl Urban Policy and New Community Development Act, as amended in 1977, P.L. 91-609, 42 U.S.C. 4503, The President's 1978 National Urban Policy Report was submitted to the Congress in August 1978. The Report reflects a strong Federal commitment to the expansion of community development aid to distressed cities and distressed neighborhoods. The following three objectives are incorporated in the President's urban policy: (1) the provision of fiscal relief to the most hard pressed communities, (2) the development of strong incentives to attract private investment to distressed communities and (3) the provision of employment opportunities, primarily in the private sector for the long-term unemployed and disadvantaged in urban areas. These policy objectives are interrelated in their reliance on the Federal government as a catalyst for distressed community revitalization.

The targeting of Federal procurement activities and Federal spending to distressed cities is a viable government incentive which should enhance the possibility of achieving all three urban policy objectives. Specifically, the President's Report indicates that targeted Federal spending and procurement activities can assist in retaining and expanding existing business and industries by increasing business opportunities. Targeted procurements also expand business opportunities for local residents and allow distressed areas to compete more effectively for newer firms. By thus expanding and strengthening the economic base in distressed communities through procurement, public and private sector employment opportunities for the disadvantaged and long-term unemployed can be increased.

A similar theme was pursued by the President in Executive Order 12073 signed on August 16, 1978, regarding Federal Procurement in Labor Surplus Areas. The President directed federal agencies to encourage the location of procurements in labor surplus areas in order to foster economic development in those areas. Since about half of distressed communities are within labor surplus areas, the contemplated targeting of DOE procurements will channel economic benefits from Federal funds consistent with the objectives of E.O. 12073.

3. Amendments to the Small Business Act and the Small Business Investment Act of 1958

Amendments to the Small Business Act and the Small Business Investment Act of 1958, P.L. 95-89, August 4, 1977, parallel the Executive Order, calling for a priority to the awarding of contracts to firms substantially performing within areas of concentrated unemployment or underemployment as well as within labor surplus areas.

Distressed cities are areas of "unemployment" or "underemployment" and are frequently within labor surplus areas. Accordingly, this statute which is applicable to Federal agencies including the Department of Energy, can be appropriately implemented by targeting procurements to distressed cities.

4. Defense Manpower Policy No. 4A

Defense Manpower Policy No. 4A (DMP No. 4A) (32 A CFR Part 8) provides an additional basis for an evaluation factor for locating procurement activities in distressed cities. Like the Small Business Act Amendments, Section 7(a) of DMP 4A specifically requires that priority be given in the awarding of contracts to concerns which substantially perform those contracts within surplus areas. (Labor surplus area set asides are also authorized if there is a reasonable expectation that sufficient offers will be obtained at reasonable prices from responsible firms). Agencies are given discretion to implement this directive "to the extent that procurement objectives will permit." §7(c). By targeting procurements to distressed cities, DOE will contribute to the achievement of this directive and serve the strong Federal interest of increasing the labor pool for Federal contracts.

III. Conclusion

The discussion above sets forth the multiple authorities that support the imposition of a non-technical factor for award in Federal procurements. As illustrated by the case law, where a social or economic policy is expressed in statute, executive order, directive, or other statement of government policy, there is latitude to implement such policies in Federal procurement. Specifically, there is considerable authority in statute and in statements of policy for the targeting of procurement activities to distressed communities. Accordingly, we conclude that it is legally permissible to award points under a published evaluation factor in research, development or demonstration procurements to proposers which will locate substantial economic activity related to the procurement in a distressed city or pocket of poverty as defined by HUD regulations.

Attachment

NOV 7 1979

Milton J. Socolar, Esquire
General Counsel
U.S. General Accounting Office
Washington, D.C. 20548

Re: Protest by Bell-Hi Company
and Stanley Maracle
B-195150

Dear Mr. Socolar:

This responds to your request for a report concerning Bell-Hi Company's protest against award by the Seneca Nation Housing Authority of a contract to All Indian Services Constructon Co., Inc. (AISC) for the construction of 50 single-family dwelling units. It is our opinion that GAO lacks jurisdiction to hear this protest and in any event the protest is without merit.

Factual Background

The subject protest is a protest against the proposed award by the Seneca Nation Housing Authority (SNHA) of a contract for the construction of 50 single-family dwelling units of housing to be constructed by the "Turnkey" method on two Seneca Nation Indian reservations.

The SNHA is not an agency of the Federal Government, but is, rather, an Indian housing authority created by the Seneca Nation of Indians, pursuant to Tribal Ordinance dated June 7, 1962. Under that ordinance SNHA is empowered, *inter alia*:

> To enter into agreements, contracts and understandings with any governmental agency, Federal, state or local (including the Council) or with any person, partnership, corporation or Indian tribes; and to agree to any conditions attached to Federal financial assistance."

Article V, § C.

Under Section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. §1437(a), HUD is authorized "to make annual contributions to public housing agencies to assist in achieving...the low income character of [PHA] projects," and "to embody the provisions for such annual contributions in a contract guaranteeing their payment." Section 5 further provides that "[a]nnual contributions payable under this section shall be pledged...as security for obligations issued by a public housing agency..." The contract evidencing this obligation is known as an "Annual Contributions Contract (ACC).

Pursuant to the above statute, HUD and SNHA have entered into an Annual Contributions Contract for the development of the project at issue, to be constructed under the "Turnkey Method". HUD's regulations at 24 CFR §805.203(b) establish the procedure for contract award under the Turnkey Method:

> (b) Turnkey Method. Under the Turnkey method, the IHA [Indian Housing Authority] advertises for developers to submit proposals to build a project described in the IHA's Invitation for Proposals. The Invitation for Proposals may, when approved by HUD, prescribe the sites to be used. The IHA selects, subject to HUD approval, the best of the proposals received, taking into consideration price, design, the developer's experience and other evidence of the developer's ability to complete the Project. After HUD approval of the proposal selected by the IHA, the working drawings and specifications are agreed to by the developer, the IHA, and HUD, and the developer and the IHA enter into a Contract of Sale.

SNHA issued an Invitation for Proposals (IFP) on May 23, 1979. By June 1, 1979, the closing date for submission of proposals, three proposals were received; the proposers were Bell-Hi Company & Stanley Maracle (the protester), All-Indian Services Construction Company (AISC), and Owl Homes, Inc. (See Exhibit A) Following an evaluation of the relative strengths and weaknesses of the proposals received, in keeping with the guidelines established in 24 CFR §805.203(b) above and paragraph 6-7b of HUD's Interim Indian Housing Handbook 7440.1, SNHA determined that AISC's proposal was the best of the three submitted, taking into consideration site, price, design, and the developer's capabilities. Furthermore, SNHA determined that neither of the proposals submitted by Bell-Hi and Owl Homes was responsive to the solicitation. (See Exhibit B) HUD also concluded that AISC should receive the award after its review as required by the above-cited regulation and handbook provision. On October 1, 1979 the development contract between SNHA and AISC was executed.

AISC is a wholly Indian-owned firm, chartered as an instrumentality of the Seneca Nation of Indians. (See Articles of Incorporation, Exhibit C). AISC's Board of Directors is composed of three officers of the Seneca Nation, plus two members of the Seneca Council, the governing body of the Seneca Nation. Officers of AISC are elected by the Board of Directors. (See Bylaws, Exhibit D).

Protester's Position

On June 8, 1979, prior to the award of a contract, Bell-Hi filed the subject protest. The substance of the protest appears to be as follows: SNHA, through its Board of Commisssioners, reviews proposals in response to an IFP and selects the proposal it considers best. The Commissioners of the SNHA are appointed by the Council of the Seneca Nation. Here, one of the proposers (AISC) is a corporation on whose board of directors sit members of the Council of the Seneca Nation. Therefore, it is asserted that the SNHA Board of Commissioners, having been appointed by the same Seneca Council, are incapable of exercising impartial judgment where one of the competing proposers is AISC. Accordingly, Bell-Hi requests that AISC be disqualified from competing in the instant procurement because of this "blatant conflict of interest".

Department's Position

GAO lacks jurisdiction to hear this protest. If, however, GAO determines to address the merits, the subject procurement was conducted in compliance with all applicable regulations, guidelines and competitive principles, and SNHA's selection of AISC does not present a conflict of interest.

Discussion

I. GAO Lacks Jurisdiction to Consider the Subject Protest

A. The Subject Protest is Outside the Scope of GAO's Bid Protest Regulations at 4 CFR Part 20

GAO's Bid Protest Regulations Provide, at 4 CFR §20.1: "(a) an interested party may protest to the General Accounting Office, the award or the proposed award of a formally advertised or negotiated contract of procurement or sale by or for any agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office" (emphasis supplied).

A review of the facts reveals that the subject protest falls outside the scope of GAO review under the above-quoted regulation. HUD is neither a party to the construction contract at issue, nor a beneficiary under that contract. HUD's only involvement derives from the ACC, which was entered into between HUD and SNHA. Moreover, as noted above, SNHA is a tribal entity, not a Federal Agency. Accordingly, the jurisdiction requirement that the contract be "by or for an agency of the Federal Government" is not met here.

Indeed, the Comptroller General has reached just this conclusion on substantially similar facts, concerning the award of a construction contract by the Erie (Pennsylvania) Housing Authority (EHA). In declining jurisdiction over a protest of that contract award, GAO noted that "the Federal Government is neither funding construction nor a party to the construction contract," and therefore "EHA is not acting as an agency of the Federal Government." Matter of A.G.I. Inc., B-187609 (1977). This reasoning is equally applicable to the instant dispute and, as such, jurisdiction under 4 CFR §20.1(a) does not lie.

B. The Contract at Issue is Outside the Scope of GAO Review of Contracts under Grants

In its Public Notice entitled "Review of Complaints Concerning Contracts under Federal Grants," 40 F.R. 42406 (September 12, 1975), GAO indicated its intent, "consistent with the statutory obligation of the General Accounting Office to investigate the receipt, disbursement, and

a

application of public funds," to "undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors." This review procedure presupposes a Federal grant award, pursuant to which the grantee enters into a contract in furtherance of the grant purposes. Unless a Federal grant is involved, the Public Notice does not apply.

The SHNA is not a grantee of Federal funds, As indicated above, the relationship between HUD and SNHA is established by an Annual Contributions Contract (ACC), pursuant to which HUD agrees (1) to loan money to SNHA to help finance project development, and (2) to guarantee payment of the notes or bonds sold privately by SNHA to finance construction. The ACC is not a grant instrument, and does not derive from any Departmental authority to award grants.

The conclusion that the SNHA is not a grantee is supported by the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §501 et. seq, which provides at §502(5) that the term "grant or cooperative agreement does not include any agreement under which...a subsidy, a loan [or] a loan guarantee...is provided." Because, as indicated above, the ACC is a loan/loan guarantee instrument, is cannot be considered a grant under the above-quoted statutory definition.

Comptroller General decisions have recognized that absent a contract under a grant or a Federal procurement, GAO does not have jurisdiction to review a protest. See Chambers Building corporation, B-184932 (1975); Matter of A.G.I. Inc., supra.

C. Summary

The construction contract at issue here is not a procurement by a Federal agency, nor is it a procurement by a grantee of Federal funds. Accordingly, neither the GAO Bid Protest Regulations nor the GAO Public Notice concerning contracts under grants provides a basis for GAO jurisdiction over this protest. GAO consideration of this matter should therefore be declined.

II. Award of the Construction Contract to AISC Does Not Present a Conflict of Interest and Is In Accordance With Applicable Legal Requirements

Assuming, arguendo, that GAO asserts jurisdiction over this protest, pursuant to its Public Notice of September 12, 1979, it is our position that the protest is without merit.

In its protest, Bell-Hi alleges that the participation of AISC in the subject procurement "is blatently [sic] contrary to the most basic conflict of interest tenets and principles," and therefore award of the contract to AISC would be improper. Nowhere does the protester allege the infraction of any particular statute, regulation, or contractual provision. As demonstrated below, however, the procurement at issue was conducted in full compliance with all applicable legal requirements, and the protester's challenge is without legal merit.

GAO's Public Notice of September 12, 1975 provides that "[T]he purpose of our review will be to foster compliance with grant terms, agency regulations, and applicable statutory requirements." Measured against these standards the procurement procedures followed in the instant case were proper. As set forth at page 2, supra, HUD's regulations at 24 CFR §805.203(b) establish the method of contract award under the "Turnkey" method of construction. In accordance with this regulation, paragraph 6-7(b) of HUD's Indian Housing Handbook 7440.1 specifies how the evaluation of proposals is to proceed. (See Exhibit E)

The applicable contract award procedures were precisely those followed in the instant procurement. After SNHA issued an Invitation for Proposals, three bids were received by the closing date of June 1, 1979. (See Exhibit A). These bids were duly evaluated by both SNHA and HUD. Based upon the proposal price and other factors, SNHA recommended that the contract be awarded to AISC. Indeed, the bids submitted by both Owl Homes and the protester were deemed by SNHA and HUD to be nonresponsive to the solicitation. (See Exhibit B)

There is nothing in the selection process in this case which indicates any deviation from the procedure mandated in 24 CFR §805.203(b), nor does the protester allege any such deviation. Moreover, the protester does not charge that the proposal submitted by AISC was deficient in any technical respect.

The protester does, however, assert that because HUD's Indian Housing Handbook directs the IHA to "identify for tentative selection the best total package proposal and not necessarily the one with the lowest total price," that this provision and hence, the Turnkey process, "provide[s] a convenient backdrop for channeling an award to AISC by use or misuse of the evaluation factors." Bell-Hi Protest, p. 3. The process is a requirement of law and in any case it is conjecture, unsupported by any evidence, that there was any "misuse of the evaluation factors." Further, to imply, as does the protester, that a contractor selection method which incorporates evaluation factors other than price is inherently unfair is to overlook the fact that negotiated procurement--where price is considered along with other factors--is a fundamental component of the Government contracting process.

Regarding the protester's "conflict of interest" allegation, there is no evidence to suggest that the selection of AISC was in any way tainted by the interrelationship between the Seneca Nation of Indians and AISC. It does not appear that AISC was privy to any pre- or post-solicitation inside information which might have given it an unfair competitive advantage over competing proposers. Moreover, as discussed above, contractor selection was conducted in strict accordance with applicable HUD regulations and guidelines. As the best proposer and indeed the only responsive proposer, AISC was selected by SNHA. The fact that some AISC directors and officers sit on the Seneca Council, which in turn appoints the SNHA Board of Commissioners, is coincidental but ultimately irrelevant in assessing the legality of the instant procurement. That SNHA considered the proposals only on their merits is demonstrated by the fact that HUD, after making its own independent evaluation as required by the regulations, also arrived at the conclusion that AISC's proposal should be approved. The circumstances of this procurement clearly belie the charge of favoritism in the contract award.

The relationship between Seneca Nation, SNHA and AISC is not violative of any statute, regulation or internal HUD guideline. The applicable conflict of interest guidance is found in 24 CFR Part 805, Subpart A, App. 1, which prescribes the language to be inserted in tribal ordinances creating Indian Housing Authorities. This appendix provides, at Article VII, paragraph 2:

> 2. During his tenure and for one year thereafter, no commissioner, officer, or employee of the Authority, or any member of any governing body of the Tribe, or any

> other public official who exercises any responsibilities or functions with regard to the project, shall voluntarily acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, or in any contract or proposed contract, relating to any project, unless prior to such acquisition, he discloses his interest in writing to the Authority and such disclosure is entered upon the minutes of the Authority, and the commissioner, officer or employee shall not participate in any action by the Authority relating to the property or contract in which he has any such interest.

The conflict-of-interest provision contained in the Tribal ordinance creating SNHA is to the same effect, except that its scope is limited to officers or employees of SNHA. (See Exhibit F)

The protester does not allege, nor is it the case here, that any commissioner, officer or employee of SNHA has any "direct or indirect interest" in the AISC contract. The mere fact that the SNHA commissioners are appointed by the Seneca Council and that some of the council members are officers of AISC, is not sufficient to make the SNHA commssioners "interested" in the AISC contract. While the governing council of the Seneca Nation does appoint the SNHA Commissioners, once appointed the SNHA acts completely independently of the Nation, in accordance with the provisions of the SNHA Tribal Ordinance. Therefore, under the governing conflict of interest provision of the Seneca Nation Tribal Ordinance there is no impropriety in SNHA's selecting AISC.

The above-quoted tribal ordinance provision set forth in the current HUD regulations governing conflicts of interest applies as well to "any member of the governing body of the Tribe" having a direct or indirect interest "in any contract or proposed contract, or relating to any project ...". Assuming that this provision governs this case (notwithstanding the fact that the actual Seneca Nation tribal ordinance of 1962 (Exhibit F) is more restrictive), given the fact that certain of AISC's directors and officers sit on the Seneca Council, the governing body of the Seneca Nation, it might appear that these officials fall within the ambit of the ordinance. However, those Seneca Council members who are affiliated with AISC were in no way "interested" in the contract within the meaning of the applicable conflict provision. As pointed out by the attorneys for the Seneca Nation of Indians (See Exhibit G) in a written submission to this Department:

> The "interest" referred to in this guideline is a financial interest, and the elected officials of the Seneca Nation who also serve as officers or directors of AISC have no financial interest in its contracts. Specifically, Article V of the AISC Articles of Incorporation provides that "no elected official of the Seneca Nation shall receive any additional salary for services performed for the company"; Article X provides that the "Company may make distributions only out of net profits" and that "any distribution of net profits shall be made to the Seneca Nation."

Thus, AISC is organized in the nature of a cooperative for the Seneca Nation, and is structured so its officers and directors do not gain financially from its corporate transactions. Accordingly, we do not believe that the conflict of interest provision applies here.

Further, even if the requisite "interest" existed, this would not render the instant procurement invalid, for several reasons. First, a careful reading of the conflict of interest provision indicates that there is, apparently, no prohibition against an interested party who is a member of the governing body of an Indian tribe participating in an action by the authority relating to the contract. The provision specifies that "the commissioner, officer or employee [of the IHA] shall not participate in any action by the Authority relating to the property or contract in which he has an interest"; but no similar sanction is imposed upon Tribal governing body members. Further, even if the phrase "commissioner, officer or employee" were construed to encompass the AISC officials who also sit on the Seneca Council, the restriction imposed would still not have been violated here. As noted above, the interested party is prevented from participating "in any action by the authority" concerning the contract in which he is interested. (emphasis supplied) The interested parties here--the Seneca Council members affiliated with AISC--did not participate in any SNHA actions respecting either the award or the prospective administration of the contract in dispute. Responsibility for these contract-related decisions lies solely with SNHA and its Board of Commissioners; the Seneca Council has no input or involvement in the contract award process. Accordingly, the applicable conflict of interest provision cannot be relied upon to invalidate any aspect of the instant procurement, and the protestor's allegations on this point are therefore without merit.

Finally, we note that under HUD regulations governing construction contract awards by IHA's, there is established an affirmative preference in favor of Indian firms:

> §805.204 Indian preference in contracting.
>
> (a) Preference in the Award of Contracts. An IHA shall to the greatest extent feasible under this part give preference in the award of contracts in connection with a Project to Indian organizations and Indian-owned Economic Enterprises, if this does not result in a higher cost or greater risk of performance.

This requirement also appears in the ACC in Part Two, Article 1, §1.2. (See Exhibit H) As discussed above, AISC is a wholly Indian-owned firm, chartered by the Seneca Nation of Indians. Because AISC submitted the lowest-priced and best proposal, SNHA was certainly justified in finding that the selection of AISC would not "result in a high cost or greater risk of nonperformance," and therefore SNHA would have been justified under the above-quoted HUD regulation to give preferential consideration to AISC.

Conclusion

On the basis of the foregoing discussion, we conclude:

(1) GAO lacks jurisdiction to consider the subject protest, and

(2) even if GAO takes jurisdiction, the procurement at issue does not violate any statute, regulation, or other legal requirement and the subject protest is without merit.

Sincerely,

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law Division

NOV 9 1979

Milton J. Socolar, Esquire
General Counsel
U.S. General Accounting Office
Washington, D.C. 20548

Re: Protest by Sieco, Inc.
B-195614

Dear Mr. Socolar:

This responds to your request for a report with respect to the above-referenced matter. The subject of this protest by Sieco, Inc. (hereinafter the protester) concerns the procurement of architectural/engineering (A/E) services by the Licking County Regional Planning Commission, on behalf of the Village of Alexandria, Ohio. The procurement was initiated to obtain a feasibility study related to water system improvements for the Village of Alexandria under a Community Development Block Grant (hereinafter block grant) awarded by the Department of Housing and Urban Development (HUD) pursuant to Title I of the Housing and Community Development Act of 1974 (P.L. 93-383).

ISSUES

The protester alleges that the Licking County Regional Planning Commission (hereinafter the County Commission) was required to apply the Federal Brooks Act (P.L. 95-582) procedures to its procurement for A/E services. The Brooks Act sets forth the procedures for the Federal procurement of A/E services. It is the contention of the protester that because the County Commission did not follow the Brooks Act in its A/E selection, the County Commission procurement was improper.

The Department disagrees with the protester and takes the position that the County Commission's procurement procedures were proper. Based upon the following, HUD asserts that the protest is without merit:

I. The Brooks Act does not apply to a non-Federal procurement.

II. The procurement procedures followed by the County Commission were consistent with Ohio law.

III. The procurement was conducted by the County Commission so as to provide maximum open and full competition consistent with the Office of Management and Budget (OMB) Circular No. A-102, Attachment O.

FACTUAL BACKGROUND

Pursuant to a Cooperative Agreement dated April 13, 1978, the Village of Alexandria, Ohio and the Commissioners of Licking County, applied for a HUD block grant for water facility system improvements. (Exhibit A). Subsequently, on December 15, 1978, HUD, through its Ohio Area Office, approved the grant application and Grant #B-78-DN-39-0259 was awarded to the Licking County Commissioners on behalf of the Village of Alexandria in the amount of $500,000. (Exhibit B). Locally, the Licking County Regional Planning Commission was authorized by the Licking County Commissioners and the Village of Alexandria to administer the grant funds.

On May 24, 1979, the County Commission issued and mailed to prospective proposers a Request for Proposals (RFP) for a water system improvement feasibility study. (Exhibit C).

Attachment B at page 1 of the RFP instructs offerors to submit their proposals in two separate parts:

> 3. Proposed submission
>
> (a) Part I shall consist of the technical and management submittal of the proposed work. Part II shall consist of complete cost and pricing data, which shall include the Attachment entitled, "Cost and Pricing Data", completed by the offeror, and any addenda thereto. Each part of the proposal shall be complete in itself in order that the evaluation of both parts can be accomplished concurrently, and the evaluation of the technical and management submittal can be made strictly on the basis of its merit.

Additionally, the Method of Selection of Contractor, at page 5 of the RFP, prescribes the following procedure:

> At the close of the engineering proposal submittal period, the LCRPC will deliver copies of all proposals to the Alexandria Village Council for independent review and evaluation.
>
> At the close of the engineering proposal submittal period, the RPC Deputy Director will evaluate and score all proposals. The RPC will also request two other County Departments to assist in its review, and recommendation. The RPC Deputy Director will prepare a recommendation to be presented to the Village Council and the County Commissioners concerning which firms should be interviewed.
>
> The RPC will ask for a meeting of the Village Council (or a special committee of Council) together with the Commissioners and two County Department heads for the purpose of interviewing firms which have submitted the top ranking proposals. The interviews and negotiations could take place during the last week of June.
>
> When the Village and the County Commissioners agree on a firm, the RPC will award a contract in the name of the Licking County Commissioners. The RPC will also, in writing, authorize the firm to begin work.

Further, the Criteria for Contractor Selection for this procurement are set forth at page 6 of the RFP:

> Selection of a contractor shall be based on:
>
> 1. The overall quality of the proposal in relation to this request;
> 2. The credentials of the firm;
> 3. Cost, price, fee, expenses;
> 4. Time of delivery of the contracted product;
> 5. The professional judgement of the Deputy Director of the LCRPC:
> 6. Additional factors as stated in Attachment B.

By the closing date for proposals, June 18, 1979, five firms submitted detailed proposals in response to the RFP: (1) KZF, Inc., (2) John David Jones and Associates, Inc., (3) A.L. Consultants, Inc., (4) Friedl & Harris, Inc. and (5) Snell Environmental Group. (Exhibit D). The protester submitted only resumes in response to the RFP. However, this incomplete submission by the protester (Exhibit E) apparently was neither intended as a response to the RFP (see Exhibit F) nor was it treated as such by the County Commission. (See Exhibit D). HUD has been informed that the previously cited selection criteria and procedures were followed by the County Commission in this procurement and that on August 3, 1979 a contractor was selected.

By letter dated July 27, 1979, to the Comptroller General (Exhibit G), the protester outlined its objections to the procedures followed for this procurement. Although the protester indicates that it is concerned with a matter of payment under an unrelated earlier contract with the Village of Alexandria, which would not be a matter for GAO jurisdiction as a matter of grantee contract administration, the principal objection to the procedures followed with respect to this procurement concerns the County Commission's failure to adhere strictly to the Federal Brooks Act (40 U.S.C. §§541-544). In short, the protester contends that the Brooks Act, which provides that with respect to A/E services, the Federal Government shall negotiate contracts with the highest qualified firm at reasonable compensation, applies to this procurement.

DISCUSSION

I. The Brooks Act is Inapplicable to a Non-Federal Procurement

The Brooks Act sets forth policies and procedures governing the negotiation by the Federal Government of contracts for architectural and engineering services. The Brooks Act provides at 40 U.S.C. §542, *inter alia*, that it is:

> [T]he policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

Under the procedures authorized by the Brooks Act, Federal agencies collect and maintain current data files on the skills, capabilities, and qualifications of A/E firms. When a procuring Federal agency requires A/E services, these files are evaluated, and the firms are ranked by the agency according to their specialized experience and competence, and their ability to perform the required services within time constraints. Discussions on approach are then conducted by the agency with not less than three of the most highly qualified firms, and the firms are then evaluated in order of preference. Price negotiations are conducted with the top ranked firm to obtain a price which is fair and reasonable. If price cannot be agreed upon, negotiations are initiated with the next ranked firm, and so on, until a satisfactory contract is negotiated.

As noted in the legislative history, the purpose of the Brooks Act "is to cast in statutory form the traditional system Federal Government agencies have used for more than 30 years in the procurement of architect-engineer services." [1972] U.S. CODE CONG. & AD. NEWS 4767. The legislative history further indicates that the policy contained in the Act "applies to all agencies of the Federal Government." Id. at 4771.

The Act and regulations on their face impose requirements solely upon Federal agencies. There is nothing in the Act itself, its legislative history, or the regulations which suggests that Brooks Act procedures were meant to extend to procurements for architectural and engineering services not directly involving the Federal Government. Accordingly, there is no basis for finding that Brooks Act procedures apply to procurements by non-Federal entities generally or local block grantee agencies specifically.

II. The Procurement Procedures are Consistent with State Law

While the Brooks Act requirements do not apply here, under the terms of the block grant agreement the grantee is required to comply with the procurement standards applicable to grantees of Federal grant funds. At the time relevant to the subject procurement, the OMB Circular No. A-102, Attachment O, dated September 12, 1977, set forth the standards applicable to the grantee.[*] Attachment O of OMB Circular No. 102 states in pertinent part:

> 3. Grantees may use their own procurement regulations which reflect applicable State and local law, rules and regulations provided that procurements made with Federal grant funds adhere to the standards set forth as follows:
>
> * * * *
>
> (b) All procurement transactions regardless of whether negotiated or advertised and without regard to dollar value shall be conducted in a manner so as to provide maximum open and full competition.

Title 3 of the Ohio Revised Code, as amended, 1976, (1978 Replacement Unit) provides in pertinent part:

> Competitive Bidding on County Purchases
> 307.86 Competitive bidding required; exceptions
> Anything to be purchased..., including but not limited to, any...service, except the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser by or on behalf of the county or contracting authority,..., at a cost in excess of two thousand dollars,...shall be obtained through competitive bidding. (Emphasis added).

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[*] OMB Circular No. A-102, Attachment O was revised effective October 1, 1979. 44 F.R. 47, 874 (8/12/79). The revision sets forth, in Section 11(c)(5), a permissive exception for Federal grantees to the effect that price competition need not be used for A/E contracts. Accordingly, Federal grantees may, but are not required to, utilize competitive negotiation procedures for the procurement of A/E professional services.

The above cited provision constitutes the only state or local standard relevant to the procurement of these professional services. It provides that A/E services need not be procured by competitive bidding. However, it does not prescribe the method of procurement to be employed. Accordingly, under state law, it would appear that the establishment of the requirements and procedures for such procurements are left to the discretion of the local contracting authority, here, the County Commission. Moreover, as long as this discretion is neither abused nor applied in an arbitrary and capricious fashion, the institution of procedures which take cost into account as a factor in the selection of architects and engineers would appear completely acceptable under Ohio law. Thus, because Ohio law does not prohibit the consideration of cost as a factor in selection, it is clearly within the contracting authority's discretion to consider cost as a factor for award along with technical factors.

The Ohio law does not require competitive bidding for A/E services nor does it prescribe specific procedures for the procurement of such services. Hence, Ohio law in no way mandates implementation of Brooks Act type procedures, or any other procedures, by county contracting authorities. Additionally, it should be noted that a judgment entered on December 13, 1978 by the United States District Court, Southern District of Ohio, Eastern Division, is consistent with this principle. By its judgment, the Court permanently enjoined and restrained the Ohio Society of Professional Engineers and others from in any manner"...(b) prohibiting or restricting any purchaser from using a method of selecting an engineer which requests price or fee information, proposals or quotations for engineering services prior to the selection of an engineer." *State of Ohio, Ex Rel. William J. Brown, plaintiff,* v. *Ohio Society of Professional Engineers, and Consulting Engineers of Ohio, and Ohio Association of Consulting Engineers, defendants;* Civil Action No. C-2-77-608, (December 13, 1978). Thus, this case permits the consideration of cost in Ohio A/E services procurements notwithstanding the permissive statutory exception to the requirement of competitive bidding for A/E contractor selection.

III. The Procurement was Consistent with OMB Circular No. A-102, Attachment O

The fundamental requirement set forth in OMB Circular No. A-102, Attachment O is that all procurement transactions by Federal grantees must be conducted in a manner that provides maximum open and free competition.

In this procurement, the County Commission conformed to the requirements of OMB Circular No. A-102, Attachment O. In order to assure that a reasonable number of proposals were submitted for consideration, the County Commission disseminated the RFP publicly. Moreover, in order not to restrict competition, the RFP incorporated a clear and accurate description of the technical requirements for the services to be procured. Additionally, the comprehensive evaluation procedures and selection criteria were plainly written in the RFP in order to assure that all proposers could propose on an equal footing. Finally, the proposals were evaluated fairly. Accordingly, the requirement of full and free competition was met.

CONCLUSION

We conclude that, on its face, the Brooks Act is inapplicable to an engineering procurement by a HUD block grant recipient and that Federal law does not require that Brooks Act procedures be followed with respect to such a procurement. We also believe that under the law of the State of Ohio, a county contracting authority, here the County Commission, is not required to use competitive bidding procedures for the procurement of A/E services but may use whatever other procedures it deems appropriate within the parameters of fair, full and open competition. Finally, we conclude that the procedures for the selection of an engineering contractor embodied in the County Commission's RFP were consistent with OMB Circular No. A-102, Attachment O.

Sincerely,

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

Attachments

03 DEC 1979

Milton J. Socolar, Esquire
General Counsel
U.S. General Accounting Office
Washington, D.C. 20548

Re: Protest by Consulting
Statisticians, Inc.
B-196912

Dear Mr. Socolar:

This responds to your letter dated September 14, 1979, requesting a documented report regarding the bid protest of Consulting Statisticians, Inc. (CSI) against award by the Department of Housing and Urban Development (HUD) of a contract for "Research Data Center Design Development and Implementation".

Factual Background

In the fall of 1978, the Office of Policy Development and Research determined that there was a need to contract for the development of a data archiving facility. This facility was considered necessary for the secondary analysis and dissemination of data which had been gathered in connection with the Department's Experimental Housing Allowance Program.

Because of the unconventional form of the data involved -- heirarchically organized data sets with large files, some containing several thousand variables -- the Office of Policy Development and Research decided to request information on data archiving, prior to drafting a solicitation instrument. Accordingly, a university, government agencies and contractors who had developed data archiving facilities for the Government, were contacted in November of 1978. These entities included: the University of Michigan, the Office of Education of the Department of Health, Education and Welfare, the Bureau of Labor Statistics of the Department of Labor, and the National Archives; and the Bureau of Social Science Research, and the National Technical Information Service, which are both contractors. (Dualabs, the company later selected for award pursuant to this solicitation, was not among the institutions consulted during this pre-solicitation phase.)

In its discussions with these institutions, the Office of Policy Development and Research sought background information but did not disclose the specifics of the data archiving facility contemplated by HUD.

In March of 1979, HUD personnel from the Housing Assistance Research Division of the Office of Policy Development and Research assessed HUD's particular needs and drafted a Request for Proposals (RFP). No outside consultants or contractors assisted in the preparation or writing of the RFP. In late March of 1979, a Technical Evaluation Panel (TEP) comprised only of Department personnel, commented on the draft RFP. Subsequently, on April 12, 1979 the TEP adopted a final version of the RFP. No individuals outside of the TEP were informed of the contents of the solicitation until it was made public.

On July 9, 1979, the RFP entitled "Research Data Center Design Development and Implementation" was issued (Exhibit A). The RFP set forth the following factors for award of the contract:

Part I. Technical and Management Proposal

(35) A. The quality and explicitness of the proposal with respect to the following elements:

1. A demonstrated understanding of the requirements of the Request for Proposals and the scope of the proposed effort;
2. The offeror's ability to understand the EHAP data base (as well as other complex data bases) well enough to provide technical assistance to users, including explanations of its experimental components, research issues addressed by each, and technical design of each experiment including survey sampling and collection methods;
3. The detailed description of the Data Center including a description of how such a facility would run in terms of technical and administrative staff support required, and the offeror's suggested approaches to

a. processing of codebooks
b. selection of file management/analysis packages
c. facilitating user access to (a) and (b)
d. storage mode of documentation and data
e. user training

(30) B. The characteristics of the computer system employed by the offeror:

1. Capacity to handle additional file storage and user load;
2. Cost and complexity of remote batch and interactive access;
3. Availablity of a variety of analysis software packages;
4. Permanence of hardware and staff.

(25) C. The capacity and ability of the offeror to accomodate the addition of future data sets of the Data Center; and the qualifications of the offeror and the key personnel who shall be assigned to the project in terms of background and experience with:

1. Data processing, including management of large data bases, text processing, preparation of data for statistical analysis, and data archiving;
2. Statistical methodology, including survey sampling and weight techniques.
3. Outreach and marketing to technical audiences.

(15) D. The quality and credibility of the offeror's proposed management plans regarding the following:

1. Staffing, i.e., the assignment of personnel in Phase I as well as Phase II;
2. Planned or existing approaches to standard business procedures such as billing, fee schedules, etc.;
3. Proposed outreach plan to potential users;

(10) E. The ability of the offeror to respond to the Government's requirements within the time specified.

(5) F. The offeror's commitment to affirmative action as demonstrated by the affirmative action plan proposed for the project.

Part II. Cost Proposals

The offeror's proposed cost will be considered in addition to the factors stated above to determine the proposal most advantageous to the Government.

On August 23, 1979, the closing date for proposals, ten proposals had been received in response to the RFP. On August 30, 1979, the TEP evaluated these proposals using the above technical factors for award and determined that three proposals were in the competitive range, that is, acceptable or capable of being made acceptable. The protester's proposal was found to be unacceptable. The minutes of the TEP meeting (Exhibit B*) identify the strengths and weaknesses of all ten proposals. With respect to the protester's proposal the minutes indicate, among other things, that the protester's staff lacked the necessary qualifications to provide adequate technical assistance and the proposal did not contain an adequate system for dissemination of the data.

On September 10, 1979, the TEP held oral discussions with the three contractors in the competitive range. Thereafter, the three submitted best and final proposals. On September 17, 1979, the TEP conducted its final evaluation and Dualabs was deemed to have the only acceptable proposal and was recommended for award. (Exhibit C*).

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* Both Exhibits B and C contain information concerning the relative standings of unsuccessful offerors as well as information regarding scoring by the TEP. 41 CFR 24-3.103-4 forbids the post-award release of such information to an unsuccessful offeror in a debriefing. Accordingly, we request that Exhibits B and C be withheld from the protester unless the prohibited information is deleted.

By letter dated September 5, 1979, Consulting Statisticians, Inc. protested award of this contract to the General Counsel of the General Accounting Office, and the Contracting Officer has stayed award of the contract pending resolution of this protest.

Protester's Allegations

According to the letter of protest and subsequent correspondence, the protester alleges:

1) That one firm assisted in the actual writing of the RFP, that there "was no doubt that the procurement was wired to them", and they "merely had to wait out the perfunctory procurement process";

2) That one of the "key project personnel" of a firm selected for best and final offers was a former senior HUD employee who had worked for the Office of Policy Development and Research; and

3) That the protester should have been ranked within the competitive range due to "demonstrated technical qualifications".

This report addresses these allegations and sets forth our position that this protest is without merit.

Discussion

A. No Firm Assisted in Writing the RFP and the Procurement Was Not "Wired".

As set forth above, no firm assisted in writing the RFP. The RFP was drafted soley by HUD staff and was approved by a duly designated HUD Technical Evaluation Panel. Approximately eight months prior to the RFP's publication, certain government agencies and firms were contacted by the Office of Policy Development and Research for the purpose of obtaining background information on data archiving facilities. However, at no time did any firm assist in the preparation of the RFP, nor was any firm given any specific information regarding the contemplated solicitation. Further, the firm which was selected for award did not provide any background information or have any contact with the Department regarding this project prior to submission of its proposal. Hence, any assertion that this procurement was "wired" to this firm because of alleged pre-solicitation involvement would be inaccurate.

In its evaluation of the proposals, the TEP acted in accordance with the applicable HUD Procurement Regulations. 41 CFR 24-3.805-2. The proposals were evaluated "in strict conformity with the factors for award". 41 CFR 24-3.805-2(b). The TEP identified the proposals as "acceptable or unacceptable". 41 CFR 24-3.805-2(b). A "competitive range was established", oral discussions were held with the contractors in the competitive range and each offeror was given an opportunity to revise his proposal 41 CFR 24-3.805-2(e) and (f). Lastly, the TEP, after "best and finals", performed "a final evaluation and forwarded its recommendation to the Contracting Officer". 41 CFR 24-3.805-2(h).

The record shows that the procurement was conducted in accordance with applicable regulations and that there is no evidence of "wiring", or bias, in this procurement.

E. There Was No Impropriety Regarding A Former PD&R Employee.

By letter dated September 25, 1979, the protester indicates that a key project consultant for a firm selected for "best and finals" had been a "senior employee" with the Office of Policy Development and Research, and that he was employed by HUD within six months prior to issuance of the RFP.

Our review of the facts indicates that a consultant to a firm selected for "best and finals" had been a staff economist employed by the Evaluation Division of the Office of Policy Development and Research until February 16, 1979. However, we do not believe that this in any way renders this procurement improper.

The employee in question left the Department prior to the drafting of the RFP which commenced in March of this year. He did not participate in any way whatsoever in either the development or drafting of the RFP. Further, he did not even work in the same division of the Office of

Policy Development and Research, the Housing Assistance Research Division, which drafted the solicitation document. Most significantly, there is no evidence that this employee had any "inside" knowledge regarding the RFP, nor that he or his firm was in any way favored in the evaluation because of his former HUD association. Hence, we find no evidence of any unfair competitive advantage, nor that this procurement is otherwise rendered improper because of the relationship between this former HUD employee and an offeror.

C. The Comptroller General Should Not Substitute His Judgment For That of the Technical Evaluation Panel, Respecting the Technical Qualifications of the Protester.

By letter of September 5, 1979, Consulting Statisticians, Inc. set forth a number of "demonstrated qualifications" which they allege should have placed them within "the competitive range".

The Comptroller General has held that the determination of whether a proposal is technically acceptable and meets the requirements set forth in the RFP is a matter of administrative discretion which will not be disturbed absent a clear showing of fraud or arbitrary action. METIS Corporation, 54 Comp. Gen. 612 (1975); Gloria G. Harris, B-188201; 77-1 CPD 255 (April 12, 1978); Courier-Citizen Company, B-192899, 79-1 CPD 323 (May 9, 1979).

The protester does not allege fraud or arbitrary action but rather indicates that it has a difference of opinion with a duly designated Technical Evaluation Panel acting in accordance with the regulations. This constitutes neither a valid basis for protest, nor grounds for review by the Comptroller General.

As the Comptroller General stated in a recent decision:

> It is not the function of our office to evaluate proposals and we will not substitute our judgment for that of contracting officials by making an independent determination as to which offeror in a negotiated procurement should be considered acceptable and thereby receive an award. Chauncey Bell and Associates Inc. B-192015 78-2 CPD 257 (October 6, 1978).

Accordingly, we do not believe the Comptroller General should review the decision of the Technical Evaluation Panel and substitute its judgment for that of the panel.

Conclusion

Based upon the foregoing discussion, we believe that this protest by Consulting Statisticians, Inc. is without merit.

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

Attachments

DEC 2 1 1979

Milton J. Socolar, Esquire
General Counsel
U.S. General Accounting Office
Washington, D.C. 20548

Re: Protests by Cutler's Paint
& Carpet Center and Lorie
Construction Inc.
B-195187, 195187.2

Dear Mr. Socolar:

This responds to your request for a report concerning the protests filed by Cutler's Paint & Carpet Center and Lorie Construction Inc., with respect to a contract for the construction of the Riverview Apartments project in Elmira, N.Y. Because both protests arise out of the same set of facts and raise identical issues of law, we are furnishing one report concerning both protests. It is our opinion that GAO lacks jurisdiction to hear these protests.

FACTUAL BACKGROUND

On March 3, 1978, the Buffalo Area Office of HUD awarded a contract for the construction of a low-rent housing project in Elmira, New York to Mr. Paul Burke under HUD's Section 8 program. The prime contractor hired by Mr. Burke to construct the project was Maider Construction Company, which in turn hired R.A.N.J. International Contractors Ltd. ("RANJ") as a major subcontractor. RANJ, in turn, then enlisted various subcontractors to perform the construction work required under the prime contract. Two of these subcontractors were Cutler's Paint & Carpet Center ("Cutler") and Lorie Construction Inc. ("Lorie"), the protesters herein.

The subject protests appear to be aimed at resolving contract disputes which have arisen between the protesters and the subcontractor RANJ. Both protesters allege that on March 7, 1979, they completed the work required to be performed under their respective contracts, and that final payment therefor in the amounts of $35,000.00 (Cutler) and $55,000.00 (Lorie) has not been received. In their respective letters of protest, each protester argues that "as a small businessman and taxpayer. . . I should not have to wait for my money which I have worked long and hard for and need to continue to operate my business. . . Any advice or help that you can suggest or give will be greatly appreciated."

Nowhere does either protester allege any impropriety or illegality in the award of either the prime development contract or the subcontracts thereunder to which they are parties; nor, for that matter, do the protesters allege the infraction of any Federal statute or regulation. The protests are premised solely on the alleged failure of RANJ to pay Cutler and Lorie for work performed under their respective contracts.

We understand that this dispute stems from certain alleged Davis-Bacon violations on the part of several of the subcontractors on this project. Subsequent to the Department of Labor's (DOL) discovery of these alleged violations, the developer established an escrow account sufficient to cover payment of wages for improperly paid employees. At the same time, payments to subcontractors for contract performance were proportionately reduced to establish the escrow fund. As a result, two of these subcontractors (the protesters) are seeking contractual relief from the General Accounting Office through these protests. As of this writing resolution of the Davis-Bacon matter is being pursued by DOL.

DISCUSSION

I. GAO Lacks Jurisdiction to Consider the Subject Protests

GAO's Bid Protest Regulations provide, at 4 C.F.R. §20.1:

> (a) an interested party may protest to the General Accounting Office, the award or proposed award of a formally advertised or negotiated contract of procurement or sale by or for any agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office. [emphasis supplied]

It is apparent on the face of these protests that GAO lacks jurisdiction to review them under the above-quoted regulation. As noted above, the protesters are not challenging the award of either the prime contract or their subcontracts. Rather, they seek to resolve claims for payment under contracts. In the absence of a protest concerning the award or proposed award of a Federal contract, GAO simply cannot take jurisdiction under 4 C.F.R. §20.1. Cf. Matter of Guy F. Atkinson Co., B-183842, 55 Comp. Gen. 546 (1975)(request for contract reformation held not subject to GAO Bid Protest procedures). Accordingly, in our opinion, GAO should decline jurisdiction over the protests.

CONCLUSION

On the basis of the foregoing, we conclude that GAO lacks jurisdiction to hear these protests, and therefore the protests should be dismissed.

Sincerely,

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

10 AUG 1979

MEMORANDUM TO: James R. Walker
Administrative Officer
Office of the Secretary

SUBJECT : Compensation of HUDBCA Members

This responds to your request for an opinion whether, pursuant to the Contract Disputes Act of 1978 ("the Act"), P.L. 95-563, the payment of Board of Contract Appeals (BCA) members, other than the Chairman or Vice Chairman, at a salary level equal to a GS-16, but without the classification of those members at GS-16, would satisfy §8(b)(1) of the Act which requires that members "shall receive compensation at a rate equal to that paid a GS-16..."

We conclude that the Act requires that members of the BCAs, including the HUDBCA, be paid at a salary level equal to that of a GS-16, but does not require classifying all members of BCAs in grade GS-16 or above.

I. The Statutes

The Contract Disputes Act of 1978, P.L. 95-563, provides in pertinent part at §8(a)(1) and §8(b)(1):

> §8(a)(1)...an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties.
>
> §8(b)(1)...The chairman of each board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in section 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

Section 14(g) of the Act also amends 5 U.S.C. §5108, pertaining to supergrade positions. Subsection (a) of that section, as amended by §414(a)(1)(C) of the Civil Service Reform Act, P.L. 95-454, authorizes the Director of the Office of Personnel Management (OPM) to establish the maximum number of positions which may be placed in GS-16, 17 and 18 and in the Senior Executive Service and provides that a position may be placed in GS-16, 17, or 18 only by action of the Director of OPM. Section 14(g) of the Contract Disputes Act adds a new paragraph (17) to 5 U.S.C. §5108(c), which now reads in pertinent part as follows:

> (c) In addition to the number of positions authorized by subsection (a) of this section —
>
> * * *
>
> (17) the heads of executive departments or agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by [5 U.S.C. Chapter 51]...may place additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent, quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load.

II. Background

This office rendered a legal opinion on March 9, 1979 (attached) concerning the potential conflict between the Secretary's authority under §8(a) to establish a Board and OFPP's authority under §14(g) to allocate positions among the Departments and agencies. The opinion concluded that the most reasonable interpretation of the statute would permit the Secretary to decide whether a three-member Board were justified and, if she made that determination, would require OFPP to allocate three positions to HUD. HUD, of course, cannot compel OFPP to allocate it any positions, but by letter dated February 12, 1979 the Secretary informed OFPP of her intention to establish a three-member Board. In response, OFPP allocated two supergrade positions to HUD, giving the following rationale:

> Analysis of workload data for the following agencies did not support full-time assignment of three or more law judges. If, under the authority of P.L. 95-563

> and in consideration of this analysis, an agency head determines that a board of contract appeals is justified in his or her agency, the number of supergrade positions reserved for allocation is indicated below:
>
> * * *
>
> Department of Housing and Urban Development 2
>
> [OMB Policy Letter 79-2 (June 26, 1979), ¶3(f)]

Because OFPP has refused to allocate a third supergrade position to the HUDBCA the question is presented whether the Secretary, who has already determined that the HUDBCA workload justifies a three-member Board, may appoint as the third member a person in a position below GS-16.

III. Legal Discussion

Section 8(b)(1) of the Act specifies on its face that BCA members (other than the Chairman and Vice Chairman who are to be paid at a "rate equal to" GS-18 and 17 respectively) are to "receive compensation at a rate equal to that paid a GS-16."

It has been stated that where there are no ambiguities on the face of a statute, there is no need to resort to the legislative history of the statute. See, for example, Selman v. United States, 204 Ct.Cl. 675 (1974). The words "receive compensation at a rate equal to that paid a GS-16" are clear on their face. They constitute an unambiguous mandate with respect to rate of compensation without imposing any requirement with respect to classification.

However, even where a statute may be said to be clear on its face, the Supreme Court has held that when there is legislative history available as an aid to construing words used in a statute, there is no rule of law which forbids use of that history. Cass v. United States, 417 U.S. 72, 78-9 (1974). See also United States v. Duncan, 527 F.2d 1278, 1280 (3rd Cir. 1975). Further, the duty of an administering agency to examine the legislative history has been pointed out by commentators who have noted:

> . . .the distinction between the use of legislative history by a government agency administering discretionary authority and its use by a court or an administrative tribunal engaged in a judicial or quasi-judicial proceeding affecting the legal rights of parties who are reasonably entitled to rely on the plain meaning of a statute. To a government

> attorney, it seems quite unrealistic in the former case, to say the least, to expect an agency to ignore the clear intent of a vast majority of the Congress to limit the Agency's discretionary authority to a narrower scope than expressed in a statute. [Foard and Fefferman, Federal Urban Renewal Legislation, 25 Law and Contemporary Problems 635, 668-69 n.104 (Autumn 1960)]

Therefore, we have examined the relevant legislative history. We have found no clear indication of legislative intent that board members must be classified in GS-16 positions so long as they receive compensation equal to that applicable to a GS-16.

In the Report of the Senate Committee on Governmental Affairs and the Committee on the Judiciary (S. Rep. No. 95-1118 on S. 3178 at page 24), the Committees set forth the following description in the section-by-section analysis of S. 3178:

> Section 8(b)(1) details the selection process and grade levels for agency board members (excluding TVA) and the Chairman and Vice Chairman. Where an agency board has more than one Vice Chairman, each shall be in grade 17.

Although this language appears to indicate that §8(b)(1) was intended to set forth grade levels for BCA members, there is evidence elsewhere in the legislative history which would indicate that grade levels were not the paramount consideration of Congress.

In this connection, the drafting history of S. 3178 is of great significance. Eleven bills were introduced to Congress prior to the drafting of the two bills which were combined to form the text of the Act. Of these eleven bills, two bills contained language which would have clearly and unequivocably mandated the placement of BCA members in supergrade positions.1/ However, in its drafting of S. 3178 the Committees chose not to use such language, drafting the text of §8(b)(1) instead. We must assume that such a choice was not without purpose.

Furthermore, the Senate Subcommittee Hearings on S. 3178 indicate that the concern of the Subcommittees focused upon the particular problem of providing a salary for BCA members which would be sufficient to attract and retain highly qualified attorneys for these positions. (See Transcript of Proceedings, United States Senate Subcommittee on Federal Spending Practices and Open Government and Subcommittee on Citizens and Shareholders, Rights and

Remedies of the Committee on Governmental Affairs, on S. 2292, S. 2787, S. 3178, June 20, 1978, pages 185-6, 200, 204-7, 210). Although the terms "grade," "compensation," and "salary" were used interchangeably, it is clear that what the Senators were discussing was the amount of money paid to BCA members.

In view of this legislative history, we find no basis for adopting an interpretation of §8(b)(1) which would go substantially beyond the unambiguous words of that provision. We therefore conclude that the words "receive compensation at a rate equal to that paid a GS-16" need not be read to impose a requirement that BCA members "be appointed to a position at GS-16."

Our attention has also been directed to a decision of the Comptroller General, B-163375 (September 2, 1971), concerning two apparently conflicting sections of the Occupational Safety and Health Act of 1970 (OSHA), P.L. 91-596, 84 Stat. 1590. Section 12(e) of OSHA provides that hearing examiners appointed under that Act are to have their compensation fixed by the Civil Service Commission (CSC), pursuant to the statutes relating to the classification and pay rates of hearing examiners in general; but §12(k) provides that such appointmenbs be made "without regard to section 5108 of Title 5, United States Code" and that "[e]ach hearing examiner shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of Title 5, United States Code." The Comptroller General concluded that §12(k) operated as a specific limitation on the general provisions of §12(e), i.e., a "limitation on the classification action of the Civil Service Commission to ensure that such positions were not classified in grades lower than grade GS-16."

We do not regard this decision as controlling in the present situation. The Comptroller General failed entirely to address or discuss the distinction between compensation rates and classification, nor is there any indication in the decision that the issue was raised. We believe extension of the conclusionary holding in that case to the present facts would be erroneous.

IV. Conclusion

For the reasons set forth above, we conclude that the Contract Disputes Act of 1978 mandates that BCA members receive a level of compensation equal to that paid a GS-16, but presents no legal obstacle to classification of a BCA member at another grade so long as compensation is equivalent to that of a GS-16.

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

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[1] The pertinent sections of the eleven bills, and the language of H.R. 11002 prior to its amendment, are set forth below:

H.R. 6085 (April 16, 1975)

§9(a)...The Chairman of each Board shall be a Level V within the Executive Pay Schedule.

S. 3512 (June 2, 1976)

§8(a)...The Chairman of each agency board shall be paid at a rate not less than the maximum rate for Level V of the Executive Schedule under section 5316 of title 5, United States Code.

H.R. 664 (January 4, 1977)

§9(a)...The Chairman of each Board shall be a Level V within the Executive Pay Schedule.

H.R. 3745 (February 22, 1977)

§8(a)...The Chairman of each board shall receive compensation as a GS-18, the vice chairman, GS-17, and all other members, GS-16. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 under existing law.

H.R. 4713 (March 9, 1977)

§7(a)...The Chairman of each Board having greater than ten members will receive the same compensation as a GS-18, the Vice Chairman, GS-17, and all other members, GS-16. The Chairman of each Board having ten or fewer members will receive the same compensation as a GS-17, and all other members, GS-16. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 under existing law.

H.R. 4793 (March 9, 1977) and H.R. 6144 (April 6, 1977)

§8(a)...The Chairman of each Board shall be compensated at the rate provided for Level V of the Executive Schedule under section 5316 of title 5, United States Code.

H.R. 7212 (May 16, 1977)

§8(a)...The Chairman of each Board shall be compensated at the rate provided for Level V of the Executive Schedule under section 5316 of title 5, United States Code.

S. 2292/H.R. 9975 (November 3, 1977)

§8(b) The Chairman of each Board having greater than ten members will receive the same compensation as a GS-18, the Vice Chairman, GS-17, and all other members, GS-16. The Chairman of each Board having ten or fewer members will receive the same compensation as a GS-17, and all other members, GS-16. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 under existing law.

H.R. 11002 (February 20, 1978)

§8(a)...The members of agency boards of contract appeals shall be examined, selected and appointed in the same manner as hearing examiners appointed pursuant to section 3105 of title 5, United States Code, with the additional requirement that such members shall have had not fewer than five years of experience in public contract law and shall receive compensation in accordance with section 5362 of such title.

S. 2787 (March 22, 1978)

§8(b)...The Chairman of each agency board shall receive compensation as a GS-18, the Vice Chairman, GS-17, and all other members, GS-16. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 under existing law.

09 MAR 1979

Edward W. Norton, Acting
General Counsel, G

Marilyn G. Wagner, Office of General Counsel, GF

Legal Analysis of HUD Board of Contract Appeals'
Interpretation of Contract Disputes Act of 1978

This responds to your request for our legal analysis of the position taken in a letter of February 28 from Michael F. Burke, Chairman of the HUD Board of Contract Appeals (HUDBCA) to the Administrator of the Office of Federal Procurement Policy (OFPP). That letter contends that OFPP has erred, both in its assertion of its legal authority and in its assessment of the pertinent caseload statistics, in its decision not to allocate any supergrade positions to the HUDBCA, a decision which would effectively abolish the HUDBCA.

The central legal issue concerns the respective authorities of the head of an executive agency (including HUD) and of the Administrator of OFPP under the Contract Disputes Act of 1978. Relevant authority of the Secretary of HUD appears in § 8(a)(1) and (c) of the Act, as follows:

> Sec. 8(a)(1) ...an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

* * *

> (c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board....

The relevant authority of the Administrator appears in §§ 8(h) and 14(g) of the Act, as follows:

> Section 8(h)
>
> Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).
>
> Section 14(g)
>
> There shall be added to subsection (c) of section 5108 of title 5, United States Code, a paragraph (17) reading as follows:
>
> > '(17) the heads of executive departments or agencies in which boards of contract appeals are established pursuant to the Contract Disputes Act of 1978, and subject to the standards and procedures prescribed by this chapter, but without regard to subsection (d) of this section, may place

> additional positions, not to exceed seventy in number, in GS-16, GS-17, and GS-18 for the independent quasi-judicial determination of contract disputes, with the allocation of such positions among such executive departments and agencies determined by the Administrator for Federal Procurement Policy on the basis of relative case load.'

The HUDBCA's legal position is that, if OFPP's authority under § 14(g) to allocate the supergrade positions is construed to permit OFPP to deny any positions to HUD, the Secretary's authority under § 8(a)(1) to establish a Board will be negated. OFPP, as we understand it, does not assert authority to deny positions arbitrarily. It asserts only that, in exercising her authority under § 8(a)(1) to establish a Board when warranted by a workload study, the Secretary must follow guidelines issued by OFPP under § 8(h), and that if, in the judgment of OFPP, the guidelines are not met, OFPP may refuse to allocate any positions. The basic legal issue, then, is who prevails in the event of a disagreement between the Secretary and the Administrator on the question of the need for a board? In our view, the law requires the Secretary, before establishing a BCA, to consult with the Administrator and in good faith to apply OFPP's guidelines, but if, after doing so, the Secretary and the Administrator cannot agree on the need for a three person BCA the Secretary may establish such a board and the Administrator must allocate three positions to it. The Administrator's authority under § 14(g), in our view, is limited to allocating those positions which remain after each agency head has decided whether a BCA is warranted in his or her agency. We feel that this is the only reasonable interpretation of the Contract Disputes Act, for the following reasons. First, a statute is ordinarily construed in a manner which gives effect to all of its parts. If § 14(g) is construed to permit the Administrator to refuse to allocate any positions based on his assessment of an agency's workload, § 8(a)(1) of the law is rendered nugatory. On the other hand, if § 8(a)(1) is construed to give the Secretary the last word on the question whether a three person board is warranted, § 14(g) would still serve a purpose, namely, authorizing the Administrator to allocate any remaining positions. Second, the Administrator's allocations under § 14(g) are to be based on "relative case load" and the Secretary is given a role in assessing her agency's case load by virtue of the fact that the Administrator is only empowered to issue "guidelines" in this area. The word "guidelines" ordinarily connotes an instrument which leaves a range of discretion in the person subject to it. The non-mandatory nature of the "guidelines" is reinforced by the provision that the Secretary need only "consult" with the Administrator before deciding whether to establish a board. Because, under the law, the Secretary is to participate in the process of assessing case load it would be unreasonable to construe § 14(g) to give the Administrator unilateral authority to decide, on the basis of case load, whether a given agency should have a board.

The foregoing conclusions, based solely on the language of the Act, are reinforced by its legislative history. The intent of Congress, as evidenced by the committee reports, was that the Administrator of OFPP not have the authority to set up or terminate a board. For example, the Senate Judiciary Committee reported out a bill (S. 3178) which would have authorized the Administrator of OFPP to "issue rules and regulations with respect to -- the establishment, functions, and procedures of the agency boards." It also contained § 14(g) in the form in which it was enacted. The Senate ultimately passed the House bill which contained the less mandatory "guideline" language discussed above, but in commenting on the "rules and regulations" provision the Committee stated:

> The authority of the Administrator in the establishment of agency boards is limited to developing the workload study formats; being the central clearing point for collection of each of the agency's workload studies: and acting in concert with the agency head in the establishment of each board. The Administrator shall not set up rules and regulations that would give him the power to unilaterally set up or terminate a board. S. Rept. No. 95-1118, p. 27.

If this is the case under "rules and regulations" then a fortiori it should be the case under "guidelines."

S. 3178, as introduced, authorized the head of an agency to establish a board "with the concurrence of the Administrator /of OFPP/", and authorized the Administrator to terminate an agency board when he determined that the volume of contract claims in that agency no longer justified the board. See Joint Hearings before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs and the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary, United States Senate, 95th Cong., 2d Sess. on S. 2292, S. 2787, and S. 3178, pp. 349, 355. The Senate Judiciary Committee amended § 8(a)(1) to substantially the form in which it was enacted, explaining the amendment as follows:

> Extensive testimony at the public hearings convinced the committees that the agency head, not the Administrator of Federal Procurement Policy, should have the ultimate responsibility to establish and terminate an agency board in his executive agency after the guidelines for establishing a board have been met. The committee concluded that it would be sufficient for the Administrator of the Office of Federal Procurement Policy to be consulted in the decisionmaking process. S. Rept. No. 95-1118, p. 9.

The Committee explained the process by which boards were to be established under § 8(a)(1), as amended:

> It will be the responsibility of each agency head who wishes to have an agency board of contract appeals within his agency to develop a workload study of cases of contract appeals based on guidelines established by the Administrator.
>
> Upon completion of the workload study, the agency head must consult with the Administrator on the advisability of

> setting up a board based on the results of that workload study. It is intended that the agency head have the ultimate responsibility for justifying a board of contract appeals within his agency, but the committees also feel that the knowledge and expertise centered in the Office of Federal Procurement Policy should be utilized through the consultation process. As part of the Administrator's administrative responsibilities under the act, he is responsible for developing the basic workload study format. His office is to be a central clearing point for the workload studies of all agencies with boards of contract appeals. The committees' intent is that the Office of Federal Procurement Policy be directly involved in an advisory role in the process for justifying the setting up, and should the case be, closing down of agency boards. S. Rept. No. 95-1118, p. 23.

In summary, based upon a thorough review of the Act and its legislative history we conclude that, while the Secretary must consult with OFPP and should apply its guidelines in deciding whether the three person HUDBCA is justified, she retains the ultimate authority for making that decision.

The second half of Mr. Burke's letter involves the interpretation of OFPP's guidelines for allocating BCA positions. OFPP apparently is counting every debarment and Mortgagee Review Board case as only 1/3 of a contract appeal for case load measurement purposes while Mr. Burke contends that at least those debarments and mortgagee cases which involve an oral hearing should be counted as the equivalent of a contract appeal. We concur in this assessment of the relative complexity of debarments and Mortgagee Review Board cases.

David White is familiar with the matters discussed in this memorandum and will be happy to discuss them with you. Mr. Burke has also expressed his willingness to brief you on these matters.

Marilyn G. Wagner
Acting Associate General Counsel
Finance and Administrative Law

JUL 1 1 1979

MEMORANDUM FOR: Thomas R. Casey
Deputy Administrator
Federal Disaster Assistance Administration

SUBJECT : Prohibition Against Personal Services Contracts and Federal Disaster Assistance

This responds to your May 20 memorandum regarding the prohibition against Government contracts for personal services as it relates to the Disaster Assistance Program. Your memorandum indicates that in a disaster response it is often necessary to hire a large number of local employees to provide essential services and that although some local residents apply and are hired, you would like, where necessary, to contract with temporary employment agencies such as Manpower and Kelly Girls to furnish personnel. Accordingly, you raise three issues for our consideration:

(1) What is the nature of the prohibition against contracts for personal services?

(2) What is the applicability of the prohibition to FDAA disaster response?

(3) May the prohibition be waived?

This opinion concludes: (1) Federal agencies may not enter into personal services contracts unless specifically authorized by statute to do so; (2) the prohibition against entering into personal services contracts is applicable to FDAA; and (3) there is no authority for waiver of the prohibition against personal services contracts. However, we believe that utilizing authority under §309 of the Disaster Relief Act of 1974, 42 U.S.C. §5149, to appoint temporary employees without regard to competitive service requirements, in conjunction with its use of contracting authority, FDAA may satisfy its requirements for temporary employees using outside employment services for recruitment.

Discussion

I. The Nature of the Prohibition Against Personal Services Contracts

The prohibition against Federal Government contracts for personal services is not found in any current Federal statute or regulation. Rather, it originates in Comptroller General decisions, and was later adopted and expanded by the Civil Service Commission (now the Office of Personnel Management--OPM). The development and scope of this policy is as follows:

A. Comptroller General Decisions

Early decisions of the Comptroller General hold that contracts by the Federal Government with private firms or individuals to provide services of a personal nature to the Federal Government are improper. E.g. 2 Comp. Gen. 544 (1923); 3 Comp. Gen. 720 (1924); 6 Comp. Gen. 324 (1926); 6 Comp. Gen. 821 (1927). The Comptroller General based these decisions on the view that the work performed under personal services contracts should have been performed by Government employees, under Government supervision, and that "the contracting with an individual or firm to perform a duty or exercise an authority imposed or conferred by law upon a Government department or establishment is not authorized." 6 Comp. Gen. 51, 52 (1926). The Comptroller General recognized, however, that personal services contracts specifically authorized by statute were not prohibited. See 6 Comp. Gen. 324 (1926). Further, where it was determined that no Government employee was capable of performing the work, a personal services contract was permissible. 13 Comp. Gen. 351 (1934); 11 Comp. Gen. 99 (1931).

Later decisions of the Comptroller General set forth criteria for determining whether the services contracted for are "personal" and, hence, improper. These factors include:

> the degree of direct Government supervision over the services performed, the furnishing of equipment and supplies [by the Government] to perform the services, the furnishing of office or working space [by the Government], the use of special knowledge or equipment, the temporary character of services which no Government employee is qualified or available

> to perform, and whether the fee or amount of the contract price is based upon the results to be accomplished rather than the time actually worked. . .

26 Comp. Gen. 468, 469 (1947). In essence, these factors reflect the view that, to the extent the services amount to "Government employment," the civil service laws forbid non-Federal employees from performing the work. 22 Comp. Gen. 700 (1943).

More recent Comptroller General decisions have framed the inquiry in terms of whether an employer-employee relationship exists and hence whether a personal services contract is present. In this regard according to the Comptroller General the following requirements, taken from the statutory definition of a Federal employee, 5 U.S.C. §2105, must be met to indicate such a relationship: the performance of a Federal function, appointment or employment by a Federal officer, and supervision and direction by a Federal officer. 44 Comp. Gen. 761 (1965). Where all of these elements are present, personal services are involved and employment procedures under the civil service laws must be complied with unless there is a specific statutory exemption therefrom. Id.

The Comptroller General has also recognized a further limited exception to the rule against personal services contracts. Where it is determined that contracting out for personal services would be more economical, feasible or necessary due to unusual circumstances, and where a specific job is to be performed which requires little or no Government supervision, the personal services contract prohibition will not be applied. 51 Comp. Gen. 561 (1972); 45 Comp. Gen. 649 (1966); 43 Comp. Gen. 390 (1963).

B. Office of Personnel Management Policy

The Office of Personnel Management, as successor to the Civil Service Commission, has the authority to interpret and administer the Federal civil service laws. 5 U.S.C. §§1103, 1104. In 1967, after becoming aware that millions of dollars were being spent by the Goddard Space Flight Center for contracts for personal services, the Civil Service Commission wrote an extensive opinion which, among other things, set forth in detail the test for determining whether personal services contracting was present. The guidelines, set forth in an opinion by then General Counsel Pellerzi (now known as the "Pellerzi standards") provide that:

> contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.
>
> - Performance on-site
> - Principal tools and equipment furnished by the Governmert
> - Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission
> - Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel
> - The need for the type of service provided can reasonably be expected to last beyond one year
> - The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
>   - To adequately protect the Government's interest or
>   - To retain control of the function involved, or
>   - To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

The Pellerzi opinion provides that all six elements must be met to constitute a proscribed contract. However, a 1968 supplement opinion (known as the "Mondello supplement") indicates that Government supervision of the contractor's employees is the key criterion for a personal services contract and that "the absence of any one or a number of [the six Pellerzi] elements would not mean that supervision does exist but only that there is less likelihood of its existence." The Pellerzi opinion also holds that there will be no objection to personal services contracts where Congress has by statute specifically permitted a Federal agency to exempt such contracts from the requirements of the personnel laws, contained in Title 5 of the United States Code.

According to the U.S. Court of Appeals for the District of Columbia Circuit, the Pellerzi standards, read in conjunction with the Mondello supplement, constitute the definitive yardstick for determining whether proscribed personnel contracting practices are present. Lodge 1858 American Federation of Government Employees v. Webb, 580 F.2d 496 (D.C. Cir. 1978). Recent Comptroller General decisions indicate that the Comptroller General also applies the Pellerzi and Mondello criteria in making this determination. 53 Comp. Gen. 702 (1974); 53 Comp. Gen. 542 (1974). Accordingly, we are applying these criteria to the type of contracts you propose in order to determine their legality.

II. Applicability of the Personal Services Contract Prohibition to FDAA Programs

The Disaster Relief Act of 1974, 42 U.S.C. §5121 et. seq., grants to the President the authority to "coordinate"the activities of all Federal agencies providing disaster assistance." 42 U.S.C. §5142(a). By Executive Order 11795, July 11, 1974, the President delegated most of his authority under the Disaster Relief Act to the Secretary of Housing and Urban Development. The Secretary of HUD has, in turn, delegated this authority to FDAA. 39 Federal Register 28227 (August 5, 1974).

Section 7(c) of the Department of Housing and Urban Development Act, 42 U.S.C. §3537, provides that "the Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees. . .as shall be necessary to carry out the provisions of this Act and to prescribe their authority and duties."

Because, as indicated above, FDAA exercises authority of the Secretary of HUD in hiring its personnel, FDAA is generally subject to all civil service and classification laws in accordance with the HUD Act (except as pursuant to a limited exemption under the Disaster Relief Act discussed fully below). Accordingly, it is necessary to consider the contracts you propose under the applicable rules to determine whether prohibited personal services contracts are contemplated.

We understand that you intend to use the temporary personnel obtained by contract with a Manpower-type firm to perform secretarial services, primarily typing, at FDAA field offices. These temporaries would not be on the Federal payroll but would, instead, be paid by the contractor. However, we understand that they would function as if they were in fact Federal employees: they would use Government-owned property, such as typewriters, desks and office space; they would perform the same functions as their Federal secretarial counterparts; and, most importantly, they would be strictly accountable on the job to their Federal supervisors.

Under these circumstances, we must conclude that any such personal services contracts entered into by FDAA would be impermissible in light of the guidelines established by OPM and enforced by the Comptroller General. Applying the Pellerzi standards, we find that at least five of the six elements are met here: (1) the secretarial services will be performed on-site--that is, in FDAA field offices; (2) the equipment--e.g. typewriters, desks, etc.--will be furnished by the Federal Government; (3) the services are believed necessary to carry out the Federal disaster function; (4) comparable secretarial services are indeed routinely performed by other civil service employees; and (5) secretarial services are quite obviously of such nature as to require direct Government supervision to assure competent performance and thus protect the Government's interest. We understand that the temporary positions may well terminate before the end of one year, and therefore one Pellerzi element may not be met. Nevertheless, in light of the Mondello supplement clarification that all six elements need not be present, and in light of the clear presence of close Government supervision, we find that the contracts envisioned fall well within the Pellerzi criteria for prohibited personal services contracts.

Nevertheless, as noted in Part I above, agencies may be specifically permitted to enter into personal service contracts notwithstanding the general prohibition. Although, as explained below, the Disaster Relief Act of 1974 does not contain such authority, the Act does provide, at 42 U.S.C. §5149(b):

> In performing any services under this chapter, any Federal agency is authorized--
>
> (1) to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of Title 5 governing appointments in competitive service.

There is no question that this portion of the statute authorizes FDAA to appoint individuals on an as-needed basis, without regard to competitive service requirements normally imposed upon applicants for Government jobs. Any person so appointed becomes an employee of the Federal Government, albeit for a temporary period, and receives all of the benefits accorded other temporary Government employees.

However, we do not believe that 42 U.S.C. §5149(b)(1) or any other part of this statute permits personal services contracts for FDAA activities. The Pellerzi opinion makes clear that contracts which meet the six Pellerzi criteria "are proscribed unless an agency possesses a specific exemption from the personnel laws to procure personal services by contract." (emphasis supplied) But the statute here considered only addresses appointment authority and does not address personal services contracts. In the absence of a specific reference in §5149 to personal services contracts, we are unwilling in view of the Pellerzi opinion to construe the statute as exempting such contracts from the Federal personnel laws. We note that in a similar case the Comptroller General stated, in rejecting a General Services Administration argument that a particular Federal appropriation act authorized an exemption from the personal services contract prohibition, that "neither [the statute's] language nor its legislative history makes mention of personal services contracts." 44 Comp. Gen. 761, 763 (1965). We feel that if Congress had intended in the Disaster Relief Act to exempt personal services contracts from the civil service laws it would have expressly mentioned them.

Indeed, just such language expressly permitting personal services contracts may be found in other Federal statutes. For example, Veterans' Administration legislation at 38 U.S.C. §213 provides in pertinent part:

READEX FICHE best copy available

> The Administrator may, for purposes of all laws administered by the Veterans' Administration, accept uncompensated services, and enter into contracts, or agreements. . .for such necessary services (including personal services) as he may deem appropriate.

We find the omission of similar language from §5149 conspicuous by its absence. Moreover, nothing in the legislative history of §5149 indicates that the exception regarding appointments was meant to extend to personal services contracts. For these reasons, we do not feel that §5149 constitutes statutory authority sufficient to legitimize the type of contracts you propose.

We do believe, however, that your authority under 42 U.S.C. §5149(b)(1) to appoint temporary personnel, used in conjunction with general contracting authority, would permit a solution to the problem of finding available personnel to perform support services in FDAA field offices when such personnel are not available through the Department's recruitment efforts. Accordingly, we would suggest that FDAA enter into a contract[s], where necessary, with Manpower-type firm[s] to recruit temporary personnel for FDAA employment, with recruitment to be performed on a task basis by the contractor[s] acting independently. This arrangement would not, of course, be a personal services contract.

Once the individuals are recruited and selected by the contractor, FDAA would then appoint such individuals as temporary Government employees under its hiring authority in §5149(b)(1). Using this recruitment method, FDAA would avoid the legal problems associated with personal services contracts while obtaining otherwise unavailable support services.

III. Waiver Authority

Based upon our review of applicable law there is no authority for obtaining a waiver of the prohibition against personal services contracts, absent an express statutory exemption. Your memorandum lists several benefits to be derived by permitting such contracts for your program, including the administrative savings to the Government by eliminating payroll and personnel processing costs. However, under applicable law such considerations are irrelevant where proscribed personal services contracts are involved, The Comptroller General has stated: "While economy and saving to the Government is desirable, that consideration does not justify an unlawful procedure, such as the employment of personal services in the absence of specific authority of law therefor." 4 Comp. Gen. 356, 358 (1924); see also 4 Comp. Gen. 711 (1925). Accordingly, your question concerning waiver authority must be answered in the negative.

Conclusion

We conclude that under applicable law personal services contracts are prohibited, that this prohibition is applicable to FDAA, and that the prohibition may not be waived. The type of contract proposed in your memorandum--i.e., a contract with a Manpower-type firm to supply temporary secretarial personnel--would essentially create an employer-employee relationship between the Government and the temporary personnel. This arrangement would fall squarely within the prohibition on personal services contracts, and we therefore conclude that the proposed contract would be improper.

However, we suggest, instead, that you consider contracting with a firm or firms to recruit individuals for FDAA employment, provided that such individuals are appointed as temporary Federal employees under 42 U.S.C. §5149.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

NOV 26 1979

MEMORANDUM TO: Thomas R. Whittleton, Director
Office of Procurement
and Contracts

SUBJECT: Affirmative Action Requirements and Legal Services Contracts

This is in response to your memorandum of October 16, 1979 regarding affirmative action requirements and the Department's procurement of legal services. In your memorandum you note the difficulty in finding law firms that will commit to affirmative action programs and suggest that we consider various ways of handling this problem.

Specifically, you suggest that while the regulations (41 C.F.R. 60-1, Subpart C) require affirmative action programs for contracts over $50,000 and with firms in excess of 50 people, the Department should strive to award only to those firms that have established plans as set forth in the regulations (41 C.F.R. 60-2, Subpart B). You indicate also that you would like to discuss making affirmative action a factor for award and consider limiting sole source awards to firms that comply with affirmative action requirements.

I fully agree that as to procurements of over $50,000 and involving firms with more than 50 people, there must be complete and unequivocal compliance with applicable legal requirements for affirmative action plans. I have some doubts, however, about the wisdom of restricting awards to firms with affirmative action plans without regard for the size of the firm or contract. I am concerned that this would effectively limit the award of contracts to larger firms and I wonder if it would necessarily serve the objective of assuring equal opportunity. Instead, we might consider a more narrowly drawn requirement for small firms to require a pre-award affirmative action commitment that is less extensive than the full-scale affirmative action plan required by the regulations for larger firms and larger procurements.

Such a scaled-down requirement for small firms and contracts might be combined with your suggestion that an offeror's commitment to affirmative action be an evaluation factor in solicitations for contracts to be competitively awarded. I understand that this Office has assisted other components of the Department in treating affirmative action as an award factor and I think it could be used equally well for legal services procurements. With respect to sole source procurements, we should discuss whether eligibility should be limited to firms with affirmative action plans that conform to the regulations.

I look forward to discussing these approaches with you. Please let me know when this would be convenient. In the meantime, I have asked Ken Markison of my staff to look into the practices followed by other agencies in such matters so we can have the benefit of others' experience.

SIGNED

Jane McGrew

7 AUG 1979

MEMORANDUM TO: Donna E. Shalala, Assistant Secretary for Policy
Development and Research

SUBJECT : Income Certification and Recertification
Evaluation

This concerns your abstract to the Secretary, dated June 13, 1979, regarding the Income Certification and Recertification Evaluation Study to be undertaken by Policy Development and Research's Office of Evaluation. We understand the study, to be conducted by-contract, will attempt to determine whether the existing income certification and recertification system for housing program recipients is effective and, if not, why not. Specifically, the project aims to identify and eliminate errors occurring in the course of the income certification and verification process.

Your abstract states that although the study will make no special effort to detect or document fraud, it is possible that data collected during this study will reveal individual instances of fraud. Accordingly, your abstract asks whether data collected for research purposes under the study should: (1) be collected with assurances of strict confidentiality and, accordingly, not be used to initiate punitive or corrective actions; (2) be collected in confidence as to tenants but not as to projects or PHA's, thus allowing corrective action against them; or (3) be collected with no assurances of confidentiality, with suspected violations to be referred to the Inspector General or other appropriate offices.

Your Office strongly recommends the adoption of option (1), whereby individual instances of fraud detected through HUD's efforts and expenditure would be left uninvestigated. You state that the possibility of punitive action against any participant would likely diminish the quality of the data, and consequently the usefulness of the results. You indicate that Housing, on the other hand, considers option (2) a good compromise because it would not jeopardize cooperation, while faciliating the correction of possible problems. It would also negate charges that HUD is indifferent to administrative abuses which the evaluation discloses.

As set forth below, we do not believe that either of the options guaranteeing confidentiality are acceptable unless they make such confidentiality subject to the requirements of law. This includes, among other things, access by the General Accounting Office (GAO).

Assurance of Strict Confidentiality is Limited

It should be recognized that assurance of strict confidentiality concerning individually identifiable information gathered by the Government is limited. Under its statutory authority (41 U.S.C. 254(c)), GAO is empowered to conduct external audits of agencies and their research contractors. Moreover, pursuant to statute, a contract must provide that GAO has access to pertinent books and records of the contractor. Under that authority, GAO may seek access to raw data about individual data subjects.

During an assessment of the Department's Experimental Housing Allowance Program the issue of GAO access to individually identifiable data came into dispute. (See attached excerpt from GAO report.) HUD and its contractors contended that confidentiality clauses in the contract precluded GAO from obtaining access to the identities and addresses of program participants. GAO, on the other hand, claimed a legal right, pursuant to its statutory authority, to review records of participants who receive housing allowance payments. Part of the ultimate resolution of this controversy was a pledge by then Secretary Carla Hills that in the future HUD would not commit itself to denying GAO access to any information arising out of its research efforts without GAO's explicit advance approval. (See attached letter of November 6, 1975.)

Accordingly, in view of this background and applicable law, data obtained in the study may well be subject to review by GAO for auditing purposes. We would add that the necessity for access to individually identifiable data by GAO could be minimized by inserting review mechanisms into the project plan and creating "audit trails". Research plans could be designed to provide adequate monitoring and audit trails to minimize the need for recontact. This would minimize, but not eliminate, GAO's access to individually identifiable information.

Disclosure of individually identifiable information may also be compelled by court order, Congressional requests, or other statutory requirements, including the Freedom of Information Act.

In light of the foregoing, it is the opinion of this Office that any assurance of confidentiality given by HUD with respect to individuals on projects must be subject to the caveat that the information will be confidential except for auditing purposes and as otherwise required by law.

Possibility of Duty to Refer Fraud Cases to the Department of Justice

HUD may also be required to refer cases of suspected fraud to the Department of Justice, under 28 U.S.C. 535, which provides in pertinent part:

> (b) Any information, allegation or complaint received in a department or agency of the executive branch of the Government relating to violations of Title 18 [United States Code] involving Government Officers and employees shall be expenditiously reported to the Attorney General by the head of the department or agency . . .

Although 28 U.S.C. 535 on its face applies only to suspected criminal activity by Government officers or employees, the Department of Justice construes it to require agencies to report such information concerning private individuals to the Department of Justice, as well.

In this regard, the Attorney General has stated that "[i]f there is reason to suppose that acts coming to the attention of another Department are criminal in their nature, it is the duty of that Department to report these acts to the proper officials of the Department of Justice" 21 Op. Att'y Gen. 134. This affirmative duty to refer is also set forth in another opinion of the Attorney General, where it is stated that:

> . . . The question whether or not to commence a civil action or criminal prosecution is one which must, ordinarily at least, be decided by some officer of the Department of Justice. If any other Department of the Government is informed of facts which seem to require such action to be taken, its duty is to communicate them, together with any suggestions which it desires to make, to the Department of Justice. 21 Op. Att'y Gen. 509.

The duty to report known or suspected violations is stated in HUD Handbook 2000.3A, pages 1-5, paragraph 1-10:

> Assistant Secretaries, other officials of the Central Office who report to the Secretary, . . . are responsible within their respective jurisdictions for taking action to foster the enforcement of laws, orders, regulations and other applicable authority. These officials shall issue instructions requiring that known or suspected violations and irregularities are promptly referred for investigation . . .

Conclusion

Any assurance of strict confidentiality must necessarily be limited because GAO, among others, may have access to information gained in the course of the study. In addition, disclosure of such information may otherwise be required by law, and the Department of Justice considers agencies to have a duty to refer information showing criminal violations.

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

Attachments

AUG 16 1979

Mr. William Phillips, Sr.
Executive Director
Harrisburg Housing Authority
351 Chestnut Street
Harrisburg, Pennsylvania

Mr. Elliot A. Strokoff 3GE
Handler and Gerber
Suite 500-301 Market Street
Harrisburg, Pennsylvania 17101

Dear Messrs. Phillips and Strokoff:

Subject: Victor Wilburn Associates

We have reviewed Mr. Strokoff's letter with attachments of July 30, 1979 concerning contract disputes with Victor Wilburn Associates and offer the following comments. The "Public Housing Development Handbook" HUD Handbook 7417.1, Chapter 8 (March 1977) sets forth the Department's policy concerning contracts with Architects. An Architect's Agreement for the performance of architectural services may substitute an arbitration clause in states where arbitration of disputes is required. HUD Handbook 7417.1 para 8-2.b.(2). In Pennsylvania judicial arbitration is only required in certain situations. 42 Pa. C.S.A. 87361 and does not appear to be generally required. Accordingly, an arbitration clause should not be included in architect agreements for housing authorities in Pennsylvania. It also appears that arbitration would not be required in the Authority's dispute with Victor Wilburn Associates because the controversy exceeds $10,000, 42 Pa. C.S.A. 87361(b)(2). Further, Housing Authorities are not permitted to modify the form Architect Agreement unless approved by the Area Counsel, HUD Handbook 7417.1 para. 8-2.e. The Housing Authority entered into a collateral agreement submitting to arbitration which modified the form Architect Agreement without the authorization of the Area Counsel.

We will not object to the arbitration of the Housing Authority's dispute with Victor Wilburn Associates. In the future, you are advised not to include an arbitration clause in the Architect Agreement or to enter into any collateral agreement unless the Authority has the approval of the Area Counsel. Further, you are advised that this office must approve litigation costs including the cost of legal representation before an arbitration panel. Failure to obtain approval may result in audit exceptions.

Sincerely,

/s/ Peter M. Campanella

Peter M. Campanella
Acting Regional Counsel

12 JUL 1979

MEMORANDUM FOR: Lawrence B. Simons, Assistant Secretary for Housing - Federal Housing Commissioner

SUBJECT : Simplified Procedures for Insurance Upon Completion Cases with a Presale Condition

This responds to your memorandum of May 1, 1979, in which you asked us whether Notice H 78-57 (renewed as Notice H 79-48) gives Supervisors of Single Family Service Offices authority to sign the multifamily commitment and the multifamily note and mortgage required in connection with the simplified procedures for Section 234 insurance upon completion cases with a presale condition, as outlined in HUD Handbook 4265.1. For reasons set forth below, we believe that this authority is contained in the delegation of authority set forth at 24 CFR §200.114, which Notice H 79-48 delegates to the Single Family Service Office Supervisor.

Section 234 sets forth the provisions relating to mortgage insurance on condominiums. It is our understanding, based upon information provided to us by your staff, that mortgage insurance is provided by HUD under Section 234 at two different stages with respect to condominiums: at the time of construction of the units, under Section 234(d), and again upon their purchase as units by individuals, under Section 234(c). Essentially, the procedures used to insure condominium mortgages under §234(d) are multifamily procedures applicable to the project as a whole, while those procedures used to insure mortgages under §234(c) are single family procedures, based upon HUD's determination that individual condominiums are single family dwellings.

Section 234(c) requires that mortgages upon individual condominium units meet two basic requirements for eligibility for insurance, as follows:

> (1) the mortgage meets the requirements of this subsection [§234(c)] and of section 203(b), except as that section is modified by this subsection, (2) the project is or has been covered by a mortgage insured under any section (except section 213(a)(1) and (2) of this Act), notwithstanding any requirements in any such section that the project be constructed or rehabilitated for the purpose of providing rental housing:....

Your memorandum states that the simplified procedures for insurance upon completion were developed to satisfy the statutory requirement set forth at §234(c)(2). Discussion with your staff has indicated that these procedures are used in cases where the condominium project has been financed and constructed privately, without HUD involvement, but Section 234 mortgage insurance upon the individual condominium units is sought. HUD therefore insures the project as a whole at the time of its completion through the use of these simplified procedures, and simultaneously terminates that insurance in favor of the mortgage insurance upon the individual units. The procedures therefore serve merely to confer statutory eligibility upon the condominium units, which are single family dwellings, and are processed accordingly.

According to paragraph 8 of Notice H 78-57, the Supervisors of Single Family Service Offices are delegated both housing development and housing management authority with respect to single family housing. This includes the authority presently codified at 24 CFR §200.114, which states, in pertinent part:

> (e) ...to approve and issue commitments for mortgage insurance upon completion; and to insure mortgages pursuant to such commitments under section 234 of the National Housing Act, in cases involving one-to-four-family structures or groups of such structures.

The language of §200.114(e), in specifying "commitments for mortgage insurance upon completion;" appears to include the simplified procedures at issue here. In any case, it seems clear to us that these procedures are merely an initial step in the total process of insuring the mortgages on individual condominium units, which is single family processing. They are not used in connection with any mortgage insurance provided under §234(d), which provides for mortgage insurance upon the total project, and usually is given at the time construction is commencing, rather than at the time of its completion.

Under the circumstances outlined above, it is our opinion that Single Family Service Office Supervisors are currently delegated the authority to sign commitments for mortgage insurance upon completion using simplified §234 processing procedures, under 24 CFR §200.114, and Notice H 79-48.

(signed) Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

Don Murray, Area Counsel
Atlanta Area Office, 4.1G

11 JUL 1979

Irving P. Margulies, Office of General Counsel, GF

Springdale Convalescent Center
Project No. 061-43067-PM-IC-SR
Cartersville, Georgia

This is in response to your memorandum of May 29, 1979, to Burt J. Deutsch, Assistant General Counsel for Multifamily Mortgage Insurance, requesting an opinion whether all participants in a joint venture are subject to the Department's requirements for a Previous Participation Certificate (FHA Form No. 2530). Banco Mortgage Company, on behalf of the mortgagors, has advanced the argument that certain of the joint venturers are passive investors because of the limited extent of their interest and should be treated as limited partners.

The project is presently subject to a mortgage insured under Section 232 of the National Housing Act. An application is pending for a substantial rehabilitation of the project resulting in an increased insured mortgage. Such a mortgage increase necessitates the submission of 2530s by all principals.

Departmental regulations, 24 CFR 200.211, require the submission of a previous participation certificate by every principal involved in a project to be financed with a mortgage insured under the National Housing Act. Section 200.212 provides:

> "For the purpose of filing a previous participation certificate under § 200.211, the term principal includes individuals, corporations, joint ventures and partnerships having an interest in the project. . ."

We have been advised by your office that under Georgia law a joint venture is merely a contractual relationship whereby individuals undertake certain responsibilities pursuant to the terms of the contract. It is not an entity similar to a corporation or a limited partnership in which the liability of participants may be limited. All members of a joint venture are jointly and individually liable for the obligations of the venture. Since the regulations specifically provide for the filing of previous participation certificates by joint ventures, and participants in joint ventures are not exempted from the requirement as are limited partners owning less than 25% and corporate shareholders owning less than 10%, the requirement is applicable to all members of the joint venture regardless of their percentage of ownership. It is our opinion that a Form 2530, Previous Participation Certificate, is required by each participant in a joint venture that is a principal regardless of the individual's total percentage of ownership.

Your memorandum also inquired about the need for submission of a financial statement, FHA Form No. 2417. Since such form is an administrative requirement, it is our understanding that the issue will be the subject of a separate memorandum from the Office of the Assistant Secretary for Housing.

(signed) Irving P. Margulies

Associate General Counsel
Finance and Administrative Law
Division

11 SEP 1979

Paul Williams, Director, Office of Management,
HA

Irving P. Margulies, Office of General Counsel

Whether a General Partner who Resigned Prior to Foreclosure May be Held Accountable for Participation in a Project Which has Gone into Foreclosure or Default

The Previous Participation Review Committee has requested our opinion as to whether a general partner has a legal responsibility to stay with a project which appears to be going into default or foreclosure. We find no such specific legal responsibility, in either the regulatory agreement (FHA Form 2466) or in the applicable regulations, which would be a basis for disapproval by the Committee under 24 CFR § 200.214(c).

However, pursuant to § 200.214(c)(1)(iii) the Committee could disapprove a general partner who had participated in a HUD project in which there was "One or more foreclosures or defaults on an insured mortgage or mortgages, except when caused by circumstances beyond the principal's control". Therefore, where a causal link can be shown between the resignation of a partner and a subsequent default or foreclosure, or between the Partner's actions while involved in the project and a subsequent default and foreclosure, disapproval would be authorized.

In regard to the case of   , which the Committee has requested we examine in connection with this question, we are advised that the project was in default at the time of resignation. Accordingly, there exists a basis for disapproval unless the default was caused by circumstances beyond   control. We note that his August 7, 1977, letter to Mr. Weichmann (attached) argues that such circumstances existed. We further note that   alleges that his resignation was tendered upon demand of the limited partners and in order to prevent foreclosure, which would have occurred because the limited partners refused to advance funds without the resignation.

A memorandum dated June 14, 1979 (attached) from the Director of the Housing Division, Kansas City Area Office supports   allegation that the 1974 recession substantially contributed to the default and perhaps the foreclosure of this project and others in the same area. The memorandum also states that HUD files contain no written proof that a new general partner was retained or that Continental Properties, Inc., ever executed a management agreement with regard to this project.

Open questions therefore presently exist as to why his resignation was requested and whether his activity or resignation as general partner in any way contributed to the default or foreclosure. These questions must be resolved before the Committee would be in a position to finally vote on this matter.

In summary, the resignation of a general partner does not, as such, provide a basis for disapproval. However, if the resignation substantially contributes to the default or foreclosure, these circumstances could provide a basis for disapproval. In addition, disapproval is warranted under the regulations if the principal is still involved at the time of default and the default is not due to circumstances beyond the principal's control.

Irving P. Margulies
Acting Deputy General Counsel

Attachments

OCT 16 1979

Paul Williams, Director
Office of Management, HA

Attention: Bruce Weichmann, Executive Director, MPRC

Marilyn G. Wagner, Office of General Counsel, GF

The Greenhouse, FHA Project No. 023-32039
Boston, Massachusetts - Previous Participation Clearance

This memorandum will supplement our memoranda to you, dated December 19, 1978 and May 25, 1979 (Copies Attached). We concluded in our memorandum of December 19, 1978, that the principal, should be disapproved on the basis of his prior participation in two HUD-insured projects: Naugatuck Apartments and Beech Park Gardens. We affirm our conclusion that disapproval of is appropriate as to his participation in Naugatuck Apartments. However, we now reach the conclusion that it is inappropriate to disapprove for his participation in Beech Park Gardens. Our consideration of the facts in these matters is discuss below.

DISCUSSION:

a. Naugatuck Apartments, FHA Project No. 017-44062-LDI, Naugatuck, Connecticut:

We have reviewed our December 19th decision and taken into consideration certain facts unknown to this Office at the time of our prior decision and find that the facts continue to justify a decision by the Multifamily Participation Review Committee (MPRC), to disapprove the principal, from participation as a mortgagor in the subject project.

On November 3, 1978, the Boston Area Office issued a Conditional Commitment to the U.S. Life Title Insurance Company of New York, naming as the proposed mortgagor of a Section 220 project called "The Greenhouse", a multi-family high-rise apartment building to be located in downtown Boston. It is proposed that it consist of 306 units, in a 12-story building with rents ranging from $590.00 for a one-bedroom apartment to $2,000 for a three-bedroom apartment. The sponsor of the project we understand is the Christian Science Church. Since issuing the Initial Conditional Commitment, the Area Office has extended the

Commitment several times. The Commitment does not include an explicit condition, that a Final Commitment, if ussued, will be conditioned on the previous participation clearance of any principals in the project.

b. The Principal's Contentions

On September 6, 1979, the principal's attorney, , submitted a legal memorandum and back-up information concerning cash investment in the Naugatuck project, and requests reconsideration by the Committee. The principal also raised the issue of detrimental reliance by him pursuant to the issuance of the Conditional Commitment.

This Office rejects the contention of the principal that the Government's claim to the $502,621 arbitration award should be denied because of HUD's inequitable position as respects its "supervision and control" of the construction of the project. We also reject the claim of the principal that HUD's claim to the $502,621 may not be based on any provision of the Regulatory Agreement. Finally, we reject the contention of the principal that even if the mortgagor-entity is allowed to deduct the expenses of legal fees incurred on behalf of the project (See, United States v. Frank, 587 F2d 924 (8th Cir. 1978), we would be entitled to recover at most, $60,000. Accordingly, we dispute the legal conclusions of the principal as stated in its memorandum to Mr. Jon Will Pitts, forwarded on September 6, 1979. We do not believe that a Conditional Commitment to Insure may successfully be raised to assert an affirmative defense of detrimental reliance by the principal.

We also believe that many of the "expenses" of the not finally endorsed mortgage and note of Naugatuck may be rightfully attributed to construction costs payable out of draws pursuant to the terms of the mortgage and note. We suggest that your office request the Area Office to provide you with information which may establish the truth of that assertion. (See Attachments).

c. Foreclosure of Naugatuck Apartments:

We informed you in our previous memorandum that the Department has requested the Department of Justice to foreclose the note and mortgage of the project. The foreclosure has been delayed due to the persistence of a sub-contractor who has claimed that his lien is superior to that of the Secretary's mortgage. The sub-contractor has appealed decisions of the District Court and has continued his cause of action based upon a recent decision of the Supreme Court styled: United States v. Kimbell Foods, Inc., et al., 47 U.S.L.W. 4342 (April 2, 1979). The

Department of Justice has been in contact with the Office of General Counsel, Multi-Family Mortgage Branch, and is considering whether or not to seek to recover by suit, or to administratively recover the $502,621 arbitration award as well as any other debts arising out of the mortgage deficiency.

Whatever the Department of Justice decision is, it remains our opinion that the Department is entitled to seek administrative recovery of the $502,621 arbitration award from the principal, for the reasons stated here and in our previous memorandum. Contrary to asserting, the Government's interest in pursuing collection of the $502,621, is not a recent interest, but dates from the time that the Secretary became the mortgagee and made a decision to foreclose the note and mortgage.

d. The Conditional Commitment to Insure:

It is our opinion that the issuance of a Conditional Commitment to Insure does not relieve the principal from the requirement of previous participation clearance. This Office believes that the principal could not successfully assert a legal defense by reason of his reliance on the Conditional Commitment to Insure. Commitments for the insurance of mortgages are governed by 24 CFR § 200.147 et seq.

Section 200.148(a)(1) of Title 24, provides in part that:

> ". . .The Commissioner agrees to insure a mortgage on specified property. . . provided the property is sold to a purchaser who is satisfactory to the FHA as a borrower."

When the rules proposing to govern the MPRC were first published in the Federal Register, the Department stated that the procedures as proposed were to be:

> ". . .applicable to all project proposals to be financed with a mortgage insured under the National Housing Act. The purpose of the procedure is to review the previous HUD experience of all principals involved in a proposed project in order to determine the acceptability for mortgage insured of the proposal with respect to the participation of such principals." (emphasis added). 38 FR 22415, Monday, August 20, 1973.

Similarly, the regulations as published at 24 C.F.R. § 200.210 specifically apply to:

> ". . .every project to be financed with a mortgage insured under the National Housing Act. . .except those projects insured under Section 231(i) of said Act."

Section 220 of the National Housing Act (NHA), as amended (12 U.S.C. 1715k), provides that the mortgage of a property insured pursuant to Section 220 shall be held by a mortgagor who is ". . .approved by the Secretary. . ." (Section 220(d)(2)(A)). Therefore, the mortgagor of a property insured pursuant to Section 220 of the NHA, must, according to the statute obtain the approval of the Secretary. The Secretary, pursuant to his authority under 42 U.S.C. 3535(d) has promulgated regulations supra, which set out specific procedures necessary to obtain participation in HUD-insured multifamily programs.

Case law controlling the rules of contract construction compel the legal conclusion that §§ 200.148(a)(1) and 200.210 of Title 24 of the Code of Federal Regulations when read together with Section 220 of the NHA, necessarily incorporate by operation of law the requirement for 2530 Clearance as a condition precedent governing the terms of all Conditional Commitments to Insure. See, e.g., G.L. Christian and Associates v. United States, 312 F.2d 418, 427(1963); 160 Ct.Cl. 1 (1963).

Reading the Regulations and the Statutes together, as we do, we find that the MPRC has the authority to proceed to take administrative sanctions against the principal, notwithstanding his claims of legal defenses that he is not indebted to the Department. The Secretary is authorized by statute to promulgate regulations to effectuate the statutory purposes of the Department (42 U.S.C. § 3535(d)). In so doing, there were published in the Federal Register (39 F.R. 29351, August 15, 1974), regulations authorizing the MPRC to disapprove principals it may reasonably have found to have violated provisions of regulations of regulatory agreements, (24 CFR 200.214(c)(1)(ii). Thus,the failure to act in conformance with the Regulatory Agreement by a principal seeking previous participation clearance is a matter within the specific jurisdiction of the MPRC.

We add, for your information and advice, that the Administrative Law Branch has been orally advised by Mr. Chirstopher Klein of the Civil Division, Commercial Litigation Branch, Department of Justice, that that Department is considering, along with the Office of General Counsel's Insured Housing Division, Multi-family Mortgage Branch what litigation strategies the Department and Justice may employ to recover the $502,621. Accordingly, Mr. Klein has discussed this matter with Geoffrey L. Patton, Esquire, of the Multi-Family Mortgage Branch, and our Mr. Donald Grant for the purpose of meeting with this office and this Department's administrative staff to ascertain HUD's attitudes respecting the recovery of these and other monies from the mortgagor entity. We also advised that the Department of Justice is writing to this Office forthwith to express its concerns on any administrative sanctions this Department may be considering.

e. Beech Park Gardens:

We have also reviewed the evidence concerning the participation of in Beech Park Gardens. In our original advice to you on December 19, 1978, we stated that we found sufficient evidence to support a determination to disapprove the principal based upon his prior participation in Beech Park Gardens. There was also evidence that did not reveal his ownership status in Beech Park Gardens when requested during a HUD review of his previous participation in 1974. did, however, reveal his participation in Beech Park Gardens on his 1978, 2530 certification for the instant project, "The Greenhouse." Our more thorough re-examination of the evidence concerning participation of in Beech Park Gardens now convinces us that there is insufficient evidence to justify disapproval or a withhold of for matters arising out of his participation in Beech Park Gardens. The failure of to reveal his participation in Beech Park Gardens in 1974, we think presents a problem of administrative limitations on reasonableness for our failure to bring an administrative action so long after the transpiring of the events. See, In the Matter of W.P. Cherry, Jr., HUD Docket No. 77-989-DB (October 13, 1977). Notwithstanding the problem of administrative limitations, we also find that other evidence of misconduct by is supportable only by inference, there being only one witness available to give direct expert opinion testimony on behalf of the Department.

Conclusion

In summary, as to Naugatuck Apartments, we affirm our finding that this Department has adequate evidence to support a claim against for $502,621, received as a result of an arbitration settlement on behalf of the mortgagor-entity. We find that the Department of Justice is also considering recovery of these same monies on behalf of the Secretary in a separate legal action. Simultaneous pursuit by both Departments for these funds could prove counterproductive. We believe that a written opinion from the Department of Justice providing us with an expression of its position is required, and we have requested their written advice. Accordingly, should the Department of Justice advise this Department that it is proceeding to collect these funds by litigation, the MPRC would continue to be justified in disapproving the principal for any of the reasons it may find appropriate under 24 CFR § 200.214(c). Absent contrary advice from the Department of Justice, the Committee is free to approve or disapprove the principal.

We add that we find evidence in the record of decisions made by HUD Area Office personnel which may mitigate the mortgagor's liability to repay the entire amount. However, this does not mitigate the fact that the money received should have been held in trust by the mortgagor to be expended only at the direction of the FHA Commissioner as required under the Regulatory Agreement. The mortgagor may not use its role as a volunteer in recovering the money to evade its responsibilities under the covenants of the Regulatory Agreement. Notwithstanding the above, this Office does not find the amount of the offer made by the principal an acceptable amount for settlement if only legal considerations are involved.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

Attachments

4 SEP 1979

Bruce Weichmann, Chief
Participation and Compliance
Division, HAC

Marilyn Wagner, Office of General Counsel, GF

Bellridge Nursing Home
Paramas, New Jersey -

This is in response to your memorandum of August 9, 1979, requesting our advice on whether the naming of as an unindicted co-conspirator in a non-HUD fraud matter in 1972 constitutes a basis for 2530 disapproval.

The regulations, 24 CFR 200.214, provide that the Multifamily Participation Review Committee may disapprove a principal on the basis of specified adverse information existing in connection with the principal's previous participation in any HUD project, or upon information from a United States Attorney that prosecution of the principal for a felony is imminent or probable.

Naming as an unindicted co-conspirator in a non-HUD related matter in 1972 can not be used by the committee as a basis for disapproval since it does not constitute adverse information concerning his participation in a HUD project, and prosecution for a felony is neither imminent nor probable.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

10 SEP 1979

Lawrence B. Simons, Assistant Secretary for
Housing-Federal Housing Commissioner, H

Marilyn G. Wagner, Office of General Counsel, GF

Authority of the Multifamily Participation Review Committee to
Approve a Project Involving a Principal Who has been Notified
by the Department of His Proposed Suspension

You have requested our opinion as to whether the Multifamily Participation Review Committee may approve a project involving a principal who has been notified by the Department of his proposed suspension. We conclude that the Committee does have the discretion to issue such approval.

Regulations provide that the "Committee will act for the Assistant Secretary for Housing-Federal Housing Commissioner in determining the acceptability of participants in multifamily proposals, taking into consideration all past HUD-FHA experience with the principals." 24 CFR 200.93(b). The regulations further mandate that, consistent with Section 200.93, the Committee shall make a decision to approve, withhold or disapprove projects upon making certain determinations. 24 CFR 200.214.

The regulations set forth three classifications of action: mandatory approval upon making a specified determination; mandatory disapproval upon making a specified determination; and, discretionary authority to approve, withhold or disapprove in a wide range of circumstances.

The requirement for mandatory approval is found in Section 200.214(a), which provides that the Committee "shall approve projects upon a determination that there is no information concerning past HUD program experience involving the previous participation of principals that is not consistent with the acceptability of new proposals...."

The requirement for mandatory disapproval is found in the same Section, which further provides that the Committee "may also approve a project following the disapproval of a principal thereof: Provided, That it determines that the project is otherwise acceptable and able to proceed without the participation of the disapproved principal."

Accordingly, if the principal has been disapproved and the necessary determination cannot be made, the Committee would apparently have no discretion to approve the project.

The discretionary authority to approve, withhold or disapprove covers a wide range of circumstances including those listed in Sections 200.214(b) and (c), which provide that the Committee *may* withhold or disapprove a project upon certain adverse information. Although discretionary approval authority is not specifically mentioned, it is clear that where withholding and disapproval are discretionary, and the only alternative is approval, then there exists implicit discretionary authority to approve. Thus, the regulations provide for mandatory approval in one instance, mandatory disapproval in one instance, and discretionary action in all other instances.

Discretionary authority must not be exercised in an arbitrary or capricious manner. However, so long as the Committee exercises its discretion in a reasonable manner and does not violate the two mandatory provisions, it has broad discretionary authority to act. The case of a project involving a principal who has been notified of his proposed suspension would fall within this area of discretionary action.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative
Law Division

SEP 2 0 1979

Bruce Weichmann, Executive Secretary
Multi-Family Participation
Committee, HCP

Marilyn G. Wagner, Office of General Counsel, GF

Paul A. Canary and Kathryn Canary
Angler's Manor

This is in response to your memorandum requesting advice concerning 2530 action for the subject principals.

The Canarys were disapproved for participation in the subject project on May 21, 1979, because of lack of proper disclosure of an assignment of the mortgage on Canterbury Homes. In response to the disapproval, the Canarys submitted additional information and requested reconsideration of the Committee's action. The Committee considered the additional information and again voted to disapprove the Canarys' participation based on adverse information reported by the Milwaukee Area Office and an I.G. Audit of Canterbury Homes. Now, the Canarys have submitted information in response to the second disapproval, and have requested further reconsideration by the Committee. You have asked whether the matter should again be presented to the Committee for reconsideration or whether it should be referred for an Administrative hearing.

The regulations, 24 C.F.R. 200.216 provide that a principal whose participation has been disapproved may request reconsideration by the Committee. Since the purpose of the reconsideration provision is to permit the resolution of disputes without going to a full administrative hearing, the reconsideration procedure should be utilized in those cases in which there is a reasonable expectancy that the Committee's decision may be altered.

The new information submitted by the Canarys admits that a default occurred and explains that its omission was due to oversight, pointing out the fact that earlier 2530 submissions indicated the existence of the default. It also provides an explanation of other deficiencies noted in the report from the Milwaukee Area Office and provides a reasonable explanation for them. Mr. Canary stated, and the Milwaukee Area Office confirmed that disputed withdrawals of project funds have been returned to project accounts. On the basis of the additional information presented the MPRC could approve the Canarys 2530 application.

In sum, the Committee should reconsider any new information which could be reasonably expected to affect the decision. However, in cases in which the request for reconsideration contains no significant new information, and therefore no reasonable basis for assuming a change in the Committee's position, the principals should be advised that further appeal of the disapproval may be taken by utilizing the procedures set forth in 24 C.F.R. 24.10.

for
Deputy Associate General Counsel
Finance and Administrative Law

OCT 19 1979

Bruce Weichmann, Executive Secretary,
Multifamily Participation
Review Committee, HCP

Marilyn G. Wagner, Office of General Counsel, GF

(Marshalia Apartments)

At the request of the MPRC, we have reconsidered our legal opinion of September 11, 1979, relative to the subject case, in light of the MPRC's opinion that, based upon its past experience with other cases of project abandonment and default or foreclosure, a "probable cause" exists between departure from the project in question and its subsequent foreclosure.

In our opinion, the MPRC's past experience with other projects where abandonment has been followed by foreclosure is insufficient, as a matter of law, to establish a causal relationship between the abandonment and foreclosure in the instant case. The nexus, if there be one, between the abandonment and foreclosure must be capable of demonstration by reference to the history of the project in question.

Therefore, in order to invoke the disapproval sanction for the cause set forth at 24 CFR Section 200.214(c)(1)(iii), the MPRC must be satisfied, based upon its review of the history of the project in question as reflected by the record before it, that the abandonment contributed significantly to the event(s) which resulted in the default or foreclosure. Of course, the past experience of the members of the MPRC may be utilized in the evaluation of the facts of a given case and their reasonable or probable consequences. However, while this past experience may be applied to the facts of a particular case, it may not be substituted therefor. For example, if the MPRC finds that there were other projects in the same geographical area which, except for abandonment, shared similar characteristics with, and operated under circumstances and conditions similar to, the foreclosed project, this finding when coupled with the MPRC's past experience regarding the probability of default or foreclosure following abandonment of a project may warrant the conclusion that the abandonment of the project in question was the proximate cause of, or contributed significantly to, the foreclosure.

For the reasons stated above, we adhere to our previous opinion in this matter.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law
Division

NOV 29 1979

Buford A. Macklin, Director
Office of Administrative Services, AS

Irving P. Margulies, Office of General Counsel, GF

Use of the Federal Telecommunications System (FTS)
by the HUD Federal Credit Union

This is in response to your request for an opinion whether the Department may provide the HUD Federal Credit Union with use of a Federal Telecommunications System (FTS) line. In a letter dated September 14, 1979, the President of the Credit Union notified you that the Government FTS line now in use by the Credit Union is scheduled to be removed. It was his opinion that such telephone service was authorized by the Federal Credit Union Act of 1937 and, therefore, need not be removed. The Comptroller General of the United States recently addressed this issue in a decision stating that agency funds are not available to furnish, without charge, telephone service to employee credit unions. In 58 Comp. Gen. 430 (1979) (copy attached) the Comptroller General held that the Federal Credit Union Act does not authorize Federal agencies to expend appropriated funds to provide telephone service for a Federal credit union. That Act authorizes a Government agency, in its discretion, to allot space in a Federal building, without charge for rent or services, to a credit union serving Federal employees. The statute does not specify which services, in addition to rent, the agency may provide without charge. The Comptroller General interpreted "services" to mean those services necessary to meet normal space needs -- such as lighting, heat, and maintenance. Telephone service, including FTS lines, was deemed to be a special service which must be paid for from funds of the Credit Union.

It is, therefore, our opinion that the Department may not provide the HUD Federal Credit Union with a Government FTS line or other telephone service.

/s/ Irving P. Margulies

Associate General Counsel
Finance and Administrative Law

Attachment

Alfred J. DeMartini, Office of Regional
Counsel, 9G

2 JUL 1979

Marilyn G. Wagner, Office of General Counsel, GF

Identification Cards for Fee Appraisers

This responds to your memorandum of March 19, 1979 in which you ask whether there is a HUD policy or regulation governing the issuance of HUD identification cards to fee appraisers who are not HUD employees and, if not, whether we would concur in your advice to the Office of Regional Housing that such cards should not be issued to non-employee appraisers. In your memorandum you indicate that you are advised that the Veterans Administration has issued identification cards to its fee appraisers.

Although there are Departmental directives concerning issuance of identification cards to HUD employees, we know of no similar Department-wide rules or policies governing identification card issuance to non-employees. Procedures vary from region to region within the Department. Nevertheless, it is the opinion of this Office that the HUD identification card--HUD 860--should be issued only to persons who are employees of the Department.

We also believe, however, that if a determination is made, as a policy matter, that identification is needed for fee appraisers, a special identification card--not an employee ID--could be designed for this purpose, provided it clearly indicates that the holder is not a Government employee or agent.

HUD Circular 2235.5 Issuance and Retrieval of HUD Building Passes (1971) and HUD Handbook 2200.1 Identification Cards (1957) contain Central Office and Regional Office procedures for the issuance and retrieval of official HUD identification cards. Our review of both of these publications indicates that they are concerned solely with the issuance of such cards to HUD employees. Circular 2235.5 states at page 1 that "every employee entering on duty or separating from the Department will adhere" to the procedures established therein.

Handbook 2200.1 provides at page 2 that the HUD identification card "has been established as the official identification document for all employees, other than those of the Compliance Division for whom special credentials are issued." There is no language in either the Circular or the Handbook which would authorize the issuance of a HUD identification card to a non-HUD employee, and accordingly they do not in our view provide guidance concerning, or a basis for, such issuance.

Moreover, we know of no regulation or other legal authority for the issuance of identification cards to non-employees. In the absence of such authority, we believe that the issuance of identification cards to non-employees could result in violation of Federal criminal law.

The United States Code provides at 18 U.S.C. §701:

> Whoever manufactures, sells or possesses any badge, identification card, or other insignia of the design prescribed by the head of any department or agency or the United States for use by any officer or employee thereof...except as authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both." (emphasis supplied)

Because, as indicated above, HUD has no regulations or other rules authorizing the issuance of identification cards to non-employees, we believe possession of a HUD identification card by a fee appraiser could be violative of §701. Further, if regulations were promulgated, under sufficient legal authority, to permit fee appraisers to possess HUD employee identification cards, we believe such regulations could present other criminal problems. In this regard the United States Code, at 18 U.S.C. §912, also provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

In our opinion, to issue identification cards to fee appraisers could afford them the opportunity - in the course of their work or otherwise - to represent themselves as HUD employees, thereby increasing the chances of "false personation" and violation of the above statute. The chance of criminal violation is enhanced by the fact that according to the construction of several Federal courts, intent to defraud is not an essential element of the crime of false personation; the Government need only prove that the defendant falsely represented that he was a Federal officer or employee, and that he committed an overt act in such pretended capacity. U.S. v. Rossier, 528 F.2d 652 (D.C. Cir. 1976); U.S..v. Minton, 459 F.2d 451 (9th Cir.), cert. denied, 409 U.S. 863 (1972); U.S. v. Guthrie, 387 F.2d 569 (4th Cir.), cert. denied, 392 U.S. 927 (1967).

We also share the concern expressed in your memorandum that the issuance of employee identification cards to fee appraisers could create the misimpression that fee appraisers are authorized in any way to act as agents of the Department. Accordingly, in order to avoid any possible tort or contract liability resulting from the issuance of HUD identification cards to fee appraisers as well as avoid any possible criminal problems, it is our opinion that the HUD identification card should not be issued to fee appraisers.

As indicated above, however, if a policy determination is made, a special identification card could be designed and issued to fee appraisers, provided such a card clearly indicates that the holder is not a Government employee or agent and is only performing a limited service for the Government. A properly designed identification card could eliminate the legal problems discussed above, while at the same time allowing the appraiser to furnish adequate identification in the course of his work for the Department. In this regard, we understand that the Headquarters Operations Division, under the Assistant Secretary for Administration, is in the process of coordinating an effort to establish uniform procedures regarding the issuance of both official and non-official identification cards. Accordingly, if program staff in your region have further questions or suggestions in this regard they should direct them to that office.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

1 1 JUL 1979

Ms. Anne Biege
Legislative Aide
2349 Rayburn House Office Building
Washington, D. C. 20515

Dear Ms. Biege:

Assistant Secretary Welsh has asked me to reply further to Congressman Pritchard's letter transmitting a complaint of discrimination in residential mortgage lending submitted by a constituent, Mr. Robert Stern. Mr. Stern states that there is a need for federal legislation to end certain practices secondary mortgage market institutions use when evaluating a loan application.

Your constituent is complaining that these institutions consider the debt owed by an individual pursuant to court order to pay child support as part of outstanding fixed obligations for purposes of evaluating loan applications but do not include the obligation to care for children living in the home, which may be greater, as part of such fixed obligations. Mr. Stern alleges that treating child support payments in the same way as other obligations for a sum certain which are due and payable is, therefore, discrimination based on marital status.

In our interim letter of June 7 to Mr. Pritchard we mentioned the provisions of the Equal Credit Opportunity Act which prohibit discrimination in credit transactions based on marital status and forwarded to you a copy of regulations implementing that Act.

In addition you should know that the National Housing Act, Section 527 was amended in 1974 to provide that:

> "No federally related mortgage loan, or Federal insurance, guaranty, or other assistance in connection therewith (under this or any other Act), shall be denied to any person on account of sex; and every person engaged in making mortgage loans secured by residential real property shall consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit in the form of a federally related mortgage loan to a married couple or either member thereof."

It is clear therefore that under current law both primary and secondary lending institutions, such as FNMA and the Federal Home Loan Mortgage Corporation, are prohibited from discriminating in the evaluation of loan applications on the basis of marital status and from making any distinctions in considering the availability of the incomes of husband and wife together or separately in evaluating an application for a "federally related mortgage loan."

Court ordered child support is, however, a legally enforceable obligation to pay a sum certain at regular intervals and is properly calculated as part of total fixed obligations. Furthermore, the responsibility to care for oneself and any dependents is properly calculated as a part of the individuals obligations that must be met out of the remainder of total income after all fixed obligations are met. We do not believe that current federal law applicable to fair lending practices requires or provides a basis for a different treatment for child support obligations. Since the calculations described are a legitimate concern to mortgage lenders it is our opinion that there is no violation of law or good lending procedures in the practices described by your constituent.

I hope that this information will assist you in responding to your constituent's concern.

Sincerely,

Irving P.

for Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

DEC 2 0 1979

N. Baxter Jenkins, Area Counsel, 10.3G

Irving P. Margulies, Office of General Counsel

Whether Audit of Medical Records in CDBG Program Creates a Constitutional Violation of Patients Privacy

You have asked for an opinion whether audits of Community Development Block Grant (CDBG) funds by HUD or the General Accounting Office constitute an invasion of personal privacy where such audits may encompass medical records of individual patients. For the reasons discussed below we are of the opinion that an audit of medical records falls within the scope of the Department's statutory and regulatory authority and that this authority is in futherance of a legitimate government interest.

Statutes and Regulations

The Housing and Community Development Act of 1974, 42 U.S.C. §4501, authorizes the Department to conduct audits relative to Community Development Grant funds. Section 104(d) of the Act, 42 U.S.C. §5304(d) empowers the Secretary to conduct such audits and reviews as are necessary to assess program performance and compliance with applicable laws.

Section 104(g), 42 U.S.C. §5304(g) states that-

> "Insofar as they relate to funds, provided under this title the financial transactions of recipients of such funds may be audited by the General Accounting Office under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, records, files and other papers, things or property belonging to or in use by such recipients pertaining to such financial transactions and necessary to facilitate the audit."

HUD regulations implementing this portion of the Act are found at 24 C.F.R. §570 and provide in pertinent part that:

> "(a) The Secretary, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to all books, accounts, records, reports, files and other papers or property of recipients or their sub-grantees and contractors pertaining to the funds provided under this part for the purpose of making surveys, audits, examinations, excerpts and transcripts." 24 C.F.R. §570.509

The contract signed by CSCHS expressly incorporates by reference all applicable HUD regulations. Additionally, CSCHS guarantees in paragraph 16 of the Assurances form that

> "It will give HUD and the Comptroller General through any authorized representative access to and the right to examine all records, books, papers or documents related to the grant."

Discussion

Legitimate Government Interests

As noted in the opinion of the CSCHS' attorney there is a constitutionally recognized right to be free of government interference with one's private life. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The precise scope of this right has not yet been fully defined, however, medical records of individual patients have been held to fall within the parameters of the privilege. See *Whalen* v. *Roe*, 429 U.S. 589 (1977). While the right to privacy encompasses the information contained in medical records, not all disclosure of such records would constitute a constitutional violation. In *Whalen* v. *Roe*, *supra*, (1977), the Supreme Court considered a New York statute requiring a physician to submit and the state to maintain, records of all prescriptions involving certain enumerated "dangerous" drugs. The court found that the New York legislation represented a "considered attempt" to deal with the problem of drug abuse and that "requiring such disclosures to representatives of the State having responsibility for the health of the community does not automatically amount to an impermissible invasion of privacy".

In Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (1975), aff'd, 423 U.S. 975 (1975), the plaintiffs sued to enjoin the Secretary of Health, Education and Welfare from implementing certain auditing requirements for doctors who were being compensated with federal funds under the medicare and medicaid programs. The plaintiffs alleged, inter alia, that the statute violated their own right of privacy and that of their patients insofar as it required review of medical records. With regard to the physicians' claims the district court found that the statutory requirements furthered a legitimate governmental purpose and were not unreasonable. The court declined to consider any claims on behalf of the patient observing that "it was not at all clear that plaintiffs have the requisite standing in this case to assert the constitutional rights of their patients". 395 F. Supp. at 137.

The Supreme Court in Whalen v. Roe, supra, considered the patient's interests in evaluating the impact of the drug prescription reporting requirements and ruled that the nature of the privacy invasion did not "on its face pose a sufficiently grievous threat to either [doctor or patient] to establish a constitutional violation". 429 U.S. at 600.

In assessing HUD audit requirements in light of the foregoing cases it would appear that the statutory and regulatory provisions further a legitimate governmental purpose and are not unreasonable. Pursuant to the Housing and Community Development Act it is the responsibility of the Secretary to ensure that recipients of CDBG grants comply with their projected goals and the goals of the Act.

An audit of medical records as it reveals the type of services provided and the ultimate beneficiaries of federal funds is highly relevant to an assessment of program performance and necessary to maintain proper checks on the expenditure of public funds. Association of American Physicians and Surgeons v. Weinberger, supra, is persuasive precedent insofar as it validated audits which were used to verify the expenditure of federal funds for medical services. A recently reported case has overruled what appears to be the decision of the Thurston County Superior Court (reported in the Seattle Post Intelligencer) which formed the basis for your request for an opinion on this issue. The court held that Washington's physician-patient privilege which was a creature of statute did not preclude access to medical records where such access was a requirement of applicable federal statute and regulation pertaining to medicaid services. I have enclosed a copy of the decision in State of Washington v. Latta, at 48 U.S.L.W. 2313 (November 6, 1979).

Assuming the constitutionality of the audit provisions, the assertion that a physician could still be held civilly liable to a patient is not supported by case law. None of the reported decisions involving this type of claim dealt with a disclosure made pursuant to state or federal law. The tort which triggers liability is generally characterized as the unauthorized disclosure of confidentiality received information and the cases usually involve a breach of the confidentiality of the communications with respect to insurance agents or attorneys.

As a practical matter there is little likelihood that the issue of access to medical records will ever arise. The City of Seattle as a CDBG recipient is responsible for the primary audits of its subgrantee and according to the letter received from the Coordinator of the Health Services, dated May 15, 1978, the city has already given its assurances that patient records will not be requested for audit purposes. While HUD has the authority to conduct its own audit, the normal procedure is to delegate auditing responsibilities to the primary recipient.

Richard N. Haye, Regional Inspector General for Audit for Region X has stated that his office does not currently audit the Seattle Community Health Services although it is empowered to do so. He further stated that even if such an audit was anticipated, which is not presently the case, it would be unlikely that the audit would encompass the medical records. The only time he could envision his department utilizing the medical records would be a situation involving specific allegations of misconduct. Because of this eventuality, however remote, Mr. Haye thought it important to retain the authority to inspect these records.

Similarly the General Accounting Office is not conducting, nor does it plan to conduct, any audits of the Seattle Community Health Services. The auditing procedures of GAO generally do not delve deeply into individual operations; rather they assess the general performances of the larger grants. However, William Dunahay, Supervisory GAO auditor involved in Community Development Grant funds did observe that his division would undertake an audit of medical records if there was a specific complaint from a Congressman regarding the use of the funds.

Conclusion

It is the opinion of this office based on an analysis of the above-cited cases that the audit procedures in question are constitutionally permissible.

I trust this satisfactirily addresses your inquiry and apologize for the delay in response.

/s/ Irving P. Margulies
Associate General Counsel
Finance and Administrative Law
Division

Attachment

SEP 28 1979

MEMORANDUM TO: Saul A. Green, Detroit Area Office, 5.3G

SUBJECT : Michigan Truth in Renting Act, Public Act No. 454 of 1978

Your June 4, 1979 memorandum requests the General Counsel's review and guidance with regard to the recently enacted Michigan Truth in Renting Act ("the Act"). The aforesaid memorandum superseded a series of memoranda sent to several offices of OGC and Housing, each raising questions about the Act with regard to particular matters applicable to the recipients. This memorandum is intended to give you guidance in these program areas we believe are affected by the Act, as well as to answer specific questions regarding how HUD will respond to the Act.

Background

The Truth in Renting Act (P.A. 1978, No. 495), regulates all "rental agreements" concerning "residential premises" entered into in the state of Michigan after July 1, 1979.

A "rental agreement" subject to the Act is defined as a written agreement embodying terms and conditions concerning the use and occupancy of residential premises. Excluded, however, are agreements, the term of which are limited to one or more of the following: the identity of the parties, description of the premises, rental period, total rental amount due, amount of rental payments and times at which payments are due.

"Residential premises" is broadly defined and includes apartment units, flats, rooms and other premises normally thought to be within the scope of such a term.

The Act seeks to delete from all rental agreements certain specific provisions which favor the lessor. The Act lists thirteen clauses which may not be included in rental agreements for residential premises. Prohibited are provisions which:

1. Waive or alter a remedy available to the parties when the premises violates covenants of fitness and habitability;
2. Waive rights under the Michigan Security Deposit Act of 1972;
3. Exclude or discriminate against a person because of religion, race, color, national origin, age, sex, marital status, or handicap;
4. Provide for a confession of judgment by a party;
5. Relieve the lessor from liability for failure to perform, or negligent performance of, a duty imposed by law;
6. Waive or alter a party's right to demand a trial by jury, or other rights of notice or procedure required by law in a judicial proceeding arising under the rental agreement;
7. Provide that a party is liable for legal costs or attorneys' fees incurred by another party in connection with a dispute arising under the rental agreement in excess of costs or fees specifically permitted by Statute;
8. Provide for the acquisition by the lessor of a security interest in any personal property of the tenant to assure payment of rent or other charges arising under the rental agreement, except as specifically allowed by law;

9. Provide that rental payments may be accelerated if the rental agreement is breached by the tenant, unless the provision also includes a statement that the tenant may not be liable for the total accelerated amount because of the lessor's obligation to minimize damages;

10. Waive or alter a party's right with respect to possession or eviction proceedings, or with respect to summary proceedings to recover possession;

11. Release a party from a duty to mitigate damages;

12. Provide that a lessor may alter a provision of a rental agreement after its commencement without the written consent of the tenant, with certain exceptions; and,

13. Violate the Michigan Consumer Protection Act.

The Act specifically provides that any of the above provisions in a rental agreement is void. The Act also covers methods for changing rental agreements, notice requirements, and the remedies available if the Act is violated.

You state that it is your office's belief that this Act has a direct effect on a number of the Department's programs in Michigan and ask for guidance as to the proper implementation of the Act with regard to all affected program areas.

I. Basic Position for HUD-Owned Properties

Although it is the opinion of the Office of the General Counsel that the Supremacy Clause of the Constitution does not require HUD to comply with the Act (see e.g., United States v. City of Newark, U.S.D.C., D.N.J., Civil Action No. 77-1721), the Department, as a matter of policy, has decided that where compliance with the Act will not have an adverse effect on the Department's operations, the Department should amend its leases to be in compliance.

By memorandum dated July 5, 1979, Assistant Secretary for Housing Lawrence Simons stated:

> " . . . it is my recommendation that we provide tenants with the maximum protection offered so long as it is not detrimental to the Department's interest. Accordingly, I have no objections to the Detroit Area Counsel undertaking the task of preparing addenda to attach to the lease, Forms HUD 9620 and 9621 in accordance with the requirements of the Michigan Truth in Renting Law."

Accordingly, the Department has no objections to your office preparing addenda to the requisite leases in accordance with the requirements of the Michigan Truth in Renting Act. I have been informed that you have been advised of the foregoing by telephone and that you have prepared such addenda for review.

Please note that a revised HUD Lease 9532 has been approved by Daniel Martini of our Home Mortgage Division in a memorandum dated May 31, 1979 and in a subsequent memorandum dated June 26, 1979 (copies attached).

As for multifamily programs, the revised leases that you forwarded are currently being reviewed by Burt Deutsch of our Multifamily Mortgage Insurance Division in light of the Assistant Secretary's memorandum. His office will be in contact with you directly after they have completed their review.

Thus, to answer specifically your memorandum of June 4, 1979, the first two questions at the top of page 3 are answered in the affirmative, with the caveat that such changes must not be detrimental to the Department's interest.

II. Rent Increases for HUD-Owned Properties

The third question at the top of page 3 of your memorandum related to §§ 3(1)(1)(i) and 3(1)(1)(iii) of the Act. These provisions read as follows:

(1) A rental agreement shall not include a provision which:

(1) Provides that a lessor may alter a provision of the rental agreement after its commencement without written consent of the tenant, except that an agreement may provide for the following types of adjustments to be made upon written notice of not less than 30 days:

(i) Changes required by federal, state, or local law or rule or regulation.

* * * *

(iii) Changes in the amount of rental payments to cover additional costs in operating the rental premises incurred by the lessor because of increases in ad valorem property taxes, charges for the electricity, heating fuel, water, or sanitary sewer services consumed at the property, or increases in premiums paid for liability, fire, or worker's compensation insurance.

The question points out that the methods of making rental adjustments prescribed in 24 CFR 290.25 are in conflict with § 3(1)(1)(iii) and asks if the 290.25 method is acceptable based upon § 3(1)(1)(i).

The Truth in Renting Act is, in our view, poorly drafted and there is no legislative history, to our knowledge, to assist in interpreting its provisions. Also, since the Act has recently gone into effect, there are no judicial interpretations of the Act's meaning.

We consider that any rental adjustments required by our regulations could be made by the landlord by virtue of Section 3 (1)(1)(i). Even though Section 3 (1)(1)(iii) deals with changes in rental payments and would preclude automatic annual adjustments, we consider that all rental adjustments required by our regulations could be made in conformity with the Act.

III. Public Housing and Section 8 Programs

With respect to your specific question concerning rental adjustments, as stated previously, it is our opinion that any rental adjustment required by our regulations would be made in conformity with the Act.

We are also concerned with Section 4 of the Act which provides that language in substantially the following form shall be included in every lease agreement:

> "NOTICE: Michigan law establishes rights and obligations for parties to rental agreements. . . ."

There are comprehensive regulations dealing with lease provisions in the public housing and Sections 8 and 23 programs (see CFR Parts 800, 866, 880, 881 and 882). In addition to those regulations dealing with lease provisions, there are also other regulations dealing with landlord and tenant matters. As an example, Part 866 contains grievance procedures to assure public housing tenants an opportunity to be heard if they consider that their rights under a lease have been violated. In Subpart B of Part 882, there is a regulation for the existing housing program which required PHA approval before a tenant can be evicted, and Subpart E contains the procedure for terminating a tenancy in the moderate rehabilitation program. Therefore, we could only agree to the "Notice" provision of Section 4 of the Act being added to leases used in the above-mentioned programs if language is added stating that Federal laws and regulations also establish rights and obligations for parties to rental agreements, and in the event of conflict between the Federal body and laws and State law, Federal law shall control.

However, before you advise participants in our programs of our requirement for the additional language, we recommend that you obtain an opinion from the Attorney General of Michigan, or from whichever local official you consider appropriate, that the additional language would not violate Section 4 of the Act. If you cannot obtain the opinion through your office, perhaps a PHA, or some other organization connected with the State, can request the opinion.

IV. Projects with Insured and HUD-Held Mortgages

A. Subsidized and Unsubsidized Projects Generally

The June 4 memorandum also raises questions with regard to both subsidized and unsubsidized insured multifamily rental projects. In the subsidized programs, the leases conform to the model forms provided by HUD, and changes will have to be made in those leases to comply with the Act. Again, as with Secretary-owned properties, these changes should comply with the Act as much as possible without having an adverse impact on the Departments' operations.

The unsubsidized programs do not utilize HUD model form leases. You state that certain attorneys representing landlords of various projects have submitted such leases to HUD for review and approval to conform with the Act. You have asked whether the Department should review and approve these leases.

It is our view that there is no need for the Department to review such leases for this purpose. We do believe, however, such leases should be reviewed to make sure that they do not conflict with HUD's requirements.

B. Cooperatives

With regard to cooperatives, your memorandum refers to § 3(1)(1)(iii)'s limitation on rent changes during the term of the lease. You note that cooperatives have occupancy agreements which are automatically renewable every three years, whereas the monthly carrying charges would be precluded by the Truth in Renting Act with an adverse effect upon the financial health of the cooperatives. Your memorandum also states that proposed changes to occupancy agreements and the by-laws have been submitted to the Area Counsel for review as HUD approval of any changes in such documents is required. We have been requested to comment on the proposed changes. Rather than discuss specific proposed revisions, we are of the opinion that as Area Counsel, you should consider occupancy agreement and by-laws changes in light of the applicable regulations and regulatory agreement. Approval should not be given to any change which results in a conflict with the regulations and the regulatory agreement.

I understand that there has been some modification in the Michigan Truth in Renting Act with respect to cooperatives. As soon as you receive the information dealing with this matter, we would appreciate you forwarding this material to our office for review.

V. General Questions

Finally, with regard to the two questions on the last page of the June 4 memorandum, first, we do not believe that HUD should monitor compliance with the Truth in Renting Act per se, but HUD should ascertain that attempts to comply with that Act do not have a detrimental effect on HUD.

Concerning your second question, the manner of communicating our position to program participants is one for administrative discretion. However, it is our view that a Notice to each mortgagor would have greater impact than an article in a newsletter.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

Edward T. Martin, IS

SEP 18 1979

Marvin H. Lerman, IG

Legal Action Directed Against HUD Employees
Personal Liability Suits

This will respond to the legal issues raised in a memorandum addressed to you on this subject from the Boston Area Office Manager dated August 29, 1979.

The Area Manager has expressed concern about the effect of recent litigation in which Boston Area Office personnel have been named as individual defendants. Those suits pertain to programmatic and personnel actions taken by the named defendants as federal officials, but the plaintiffs are seeking damages from those defendants in their individual capacities.

The extent of the legal protection afforded to federal employees sued in their individual capacities is discussed in detail below. Briefly, an employee may be represented by Department of Justice attorneys at his request "if the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of his employment . . ." (28 C.F.R. 50.15.1). In most cases, employees will be protected from suit and from personal liability by the doctrine of absolute official immunity. Under that doctrine, federal officials are immune from suits seeking personal liability against them for actions within the scope of their authority, where those actions involved the exercise of discretion. However, where the suit alleges that the federal official violated the federal constitutional rights of the plaintiff, the official is protected from liability only under the doctrine of qualified official immunity. In such cases, if the official knew, or reasonably should have known, that the action he took within the sphere of his responsibility would deprive the plaintiff of a constitutionally protected right, then immunity will not be granted under this doctrine.

The reasons for development of the official immunity doctrine are well expressed in the following statement by Judge Learned Hand, which has been quoted extensively in subsequent cases on this subject:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .
>
> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

Legal Representation by the Department of Justice

The Department of Justice is authorized under 28 U.S.C. 517 to appear on behalf of government employees sued for actions which occurred in performance of their duties. A federal employee sued in his individual capacity may request representation by the Department of Justice, using the procedure set forth in 28 C.F.R. 50.15. The Department of Justice will generally provide representation upon the employee's request, "if the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of his employment and if he is not the target of a Federal criminal investigation with respect to such actions" (28 C.F.R. 50.15.1).

In practice, the following steps are taken to obtain legal representation for an employee by the Department of Justice: (1) the employee must submit a request for representation to his immediate supervisor along with all process and pleadings served upon him; (2) the supervisor must determine whether the employee's actions, as alleged in the litigation complaint, were taken within the scope of his employment, and must recommend whether or not legal representation should be provided for the employee; (3) the employee's request and the supervisor's recommendation are sent to this office, and then forwarded to the Associate General Counsel for Finance and Administrative Law; (4) the Associate General Counsel makes a recommendation to the Department of Justice regarding legal representation of the employee; and (5) the Department of Justice determines whether representation will be provided for the employee.

The Area Manager has expressed his concern about the effect of litigation seeking individual liability "on the ability of designated employees to perform regular duties while taking the time to (1) prepare detailed statements of their involvement in the matter sufficient to convince the Department that Government counsel should be afforded them, and (2) to assist legal counsel in preparing defense . . ." In this connection, we wish to point out that employees are free at any time to retain private counsel in such suits at their own expense, and they need not seek legal representation from the Department of Justice. However, if employees wish to be represented by the Department of Justice, it is necessary to comply with that Department's regulations in order to obtain such representation. As stated above, representation by the Department of Justice is generally granted if the employee's actions were within the scope of his employment. Since the employee and his supervisor are in the best position to know whether or not the employee was acting within the scope of his employment, it is their responsibility to supply information and to make a determination on this issue. For most cases, the time required for the employee and supervisor to complete the request and recommendation should not unduly interfere with the performance of their regular duties.

With regard to assisting legal counsel in preparation of a defense in the litigation, the affected employees again are in the best position to know the facts and to explain the basis for their actions, and their involvement in this aspect of preparing a defense to the litigation is obviously essential. However, if it becomes apparent that information needed in order to defend the litigation cannot be provided by the employees within the time required, this office should be notified and we will attempt to obtain an extension of time.

Liability of Employees Sued in Their Individual Capacities

Employees sued in their individual capacities are personally responsible for the satisfaction of any adverse judgement entered solely against them, as distinguished from a judgement entered against both an individual defendant and the United States. There is no authority for payment by the United States of a judgement entered solely against an individual.

The doctrine of official immunity has been developed by the courts to shield government officials from suit and personal monetary liability for actions taken in the course of performing their official duties. As stated by the Supreme Court in Barr v. Matteo, 360 U.S. 564, 571 (1959):

> The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

The immunity granted by the courts under this doctrine to federal employees sued in their individual capacities may be said to fall into two categories: (1) absolute immunity and (2) qualified immunity.

(1) Absolute Immunity

Absolute immunity has always been subject to the limitation that the official's act must have been within the scope of his powers, in order for the immunity to apply. See Spalding v. Vilas, 161 U.S. 483 (1896) and Barr v. Matteo, supra. However, in deciding the case of Barr v. Matteo the Supreme Court made the following statement, which has subsequently been interpreted to restrict the application of the immunity only to "discretionary" acts of government officials:

> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. Barr, supra., at 573.

The First Circuit Court of Appeals seems to have adopted this limitation of the official immunity privilege to "discretionary" acts, but has refused to restrict the application of the privilege to federal officials of any particular rank. The court's decision in Berberian v. Gibney, 514 F.2d 790, 793 (1st Cir. 1975) states, in affirming the opinion of the district court:

> The district court concluded that appellee as a government officer acting within the scope of discretion conferred on him by law was immune from suit. Appellant contends that official immunity does not extend to low ranking officers. But the immunity afforded a particular official is contingent not upon his rank, but upon the relationship between his actions and the discretion reposed in him by law.

In concluding that the federal officer's actions in Berberian fell "within the ambit of his discretion," the court of appeals relied in part on the case of David v. Cohen, 407 F.2d 1268, 1271-1272 (D.C. Cir. 1969) which stated:

> Congress has authorized the Secretary of the Treasury or his delegate to levy upon the property of any person liable for any tax where that person neglects or refuses to pay the tax after notice and demand. By a chain of delegation, the Secretary had conferred upon Mr. Lynch the power to levy for income tax deficiences. Thus Mr. Lynch's action in issuing the levies was within the scope of his authority and in discharge of his

> official duties although appellants had previously paid their taxes. The determination as to whether the conditions are present for issuing a levy is a function ancillary to the issuance of the levy itself. As Mr. Lynch did not know that the taxes had been paid, whether he should have or not, he made the type of mistake of fact that is insulated by the privilege given to nonministerial acts. [Footnotes omitted.]
>
> There remains the question whether the decision to issue levies was a non-ministerial function. The purpose of the privilege under consideration is to free officials, in exercising their discretion, from the worry that a mistake may result in a lawsuit. The test of whether a challenged action is ministerial or nonministerial is not the office per se or its height, but *whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned.* Thus, while the actions of a low-ranking administrative official are more likely to be ministerial, the privilege has been extended to administrative as well as judicial officials and to personnel whose position is low as well as to those whose rank is high. [Footnotes omitted.] (Emphasis added.)

Based upon our review of the decision in *Berberian* v. *Gibney*, it is our conclusion that absolute immunity is available to federal officials, regardless of their rank or title, in litigation brought within the jurisdiction of the First Circuit (Maine, New Hampshire, Massachusetts and Rhode Island) provided that: (1) the act performed by the federal official was within the scope of his authority, and (2) the act involved the exercise of "discretion" by that official, as defined in the statement quoted above.

The Second Circuit Court of Appeals (which has jurisdiction over cases brought in Vermont and Connecticut) has also granted absolute immunity to federal officials in suits "based upon acts committed within the scope of their official duties requiring the exercise of judgement or discretion." *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863, 870 (2d Cir. 1977), *cert. denied*, 434 U.S. 1038, 98 S. Ct. 726 (1978). Other decisions issued by the Second Circuit Court of Appeals indicate that this immunity is not to be restricted to officials of any particular rank. In *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1345 (2d Cir. 1972) the Second Circuit specifically rejected the idea that "the immunity doctrine only applies to high officials, not to officials performing police functions." The court in *Huntington Towers* and in *Bivens* applied the "discretionary" criterion established in the earlier case of *Ove Gustavsson Contracting*

Co. v. Floete, 299 F.2d 655 (2d Cir. 1962), cert. denied, 374 U.S. 827, 83 S. Ct. 1862 (1963) to determine whether federal officials are entitled to absolute immunity.

The Gustavsson case involved a claim by a construction contractor that GSA officials whose duty it was to inspect performance under the construction contract had acted maliciously in making untruthful reports concerning the performance of the contract, causing GSA to cancel the contract with Gustavsson. Gustavsson argued that the GSA officials could not claim official immunity because that doctrine applied only to "discretionary" acts, whereas the actions of the GSA officials were "ministerial." The court stated:

> There is no litmus paper test to distinguish acts of discretion . . ., and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question — is the act complained of the result of a judgement or decision which it is necessary that the Government official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability? Those responsible for inspecting and reporting on the performance of Government contracts must act with such freedom. Gustavsson, supra., at 659. (Emphasis added.)

(2) Qualified Immunity

The Supreme Court has recognized a qualified immunity, available at common law and in suits brought under 42 U.S.C. 1983 (prohibiting actions under state law which deprive persons of federal rights), for certain state officials. This qualified immunity shields state officials from individual damage claims arising from the performance of their duties, to the extent that their actions were done in good faith and with a reasonable belief in their legality. See Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1972); Pierson v. Ray, 386 U.S. 547 (1967). In all of those cases, the federal right of which the plaintiff was allegedly deprived by state officials was a right protected by the United States Constitution. See Wood v. Strickland, supra. (alleged deprivation of due process in expulsion of students by school officials); Scheuer v. Rhodes, supra. (deployment of National Guard at Kent State University campus, allegedly depriving students of lives without due process of law); and Pierson v. Ray, supra. (arrest made by police officers under unconstitutional state statute).

Qualified immunity was applied to *federal* officials in the case of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), *on remand*, 456 F.2d 1339 (2d Cir. 1972). In that case, the plaintiff had sued individual agents of the Federal Bureau of Narcotics for damages caused by an alleged violation of the Fourth Amendment guarantee against unreasonable searches and seizures. To determine whether the federal agents were entitled to immunity, the court applied essentially the same criteria used to determine qualification for absolute immunity under the cases discussed earlier: (1) whether the agents were acting within the scope of their authority and (2) if so, whether they were performing the type of "discretionary" function that entitled them to immunity from suit. *Bivens, supra.*, at 1343.

The court concluded that the agents did not have "discretion" to make an unconstitutional search and seizure, and therefore were not entitled to absolute immunity from suit. However, the court did find that the agents were entitled to claim a "qualified" immunity. That is, the agents would be immune from liability only to the extent that they could allege and prove: (1) their good faith belief that their conduct was lawful, and (2) that such belief was reasonable.

The standard of immunity to be applied to federal officials was directly confronted in *Butz v. Economou*, _____ U.S. _____, 98 S. Ct. 2894 (June 29, 1978). In that case, the plaintiff sued former Secretary Butz and other officials of the Department of Agriculture for initiating an administrative proceeding to remove plaintiff's corporation from the list of registered commodity futures merchants. The plaintiff claimed that the action against him was in retaliation for his criticism of the agency, and violated his constitutional rights of due process and freedom of expression. The Supreme Court rejected the Government's claim that the federal officials were protected by the absolute immunity afforded under *Barr v. Matteo, supra.* The court states that "*Barr* did not . . . purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers" *Butz, supra.*, at p. 2902. In reviewing the past history of the immunity defense the court concluded that "since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense" *Butz, supra.*, at p. 2903. The court noted with approval the trend of decisions by federal courts of appeals granting federal officials no greater degree of protection than that accorded to state officials. The court then stated:

> We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement . . . than is accorded state officials when sued for an identical violation under [Section] 1983. (Emphasis added). Butz, supra., at pp. 2907-2908.

The court held that, as a general rule, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to qualified immunity. The standard for qualified immunity in Scheuer v. Rhodes, supra. was adopted by the court as the standard applicable to federal officials, and reads as follows:

> . . . in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S., at 247-248, 94 S. Ct., at 1692.

An official who knows, or should have known, that his actions were unconstitutional, will not be granted immunity under these criteria. See Butz, supra. at p. 2911.

In litigation currently pending in another jurisdiction, asserting individual damage liability against federal officials, the Department has taken the position that under the Economou decision, the qualified immunity standard is applicable to federal officials only where federal constitutional rights have been violated. This is clearly in accord with the Economou decision. However, we cannot predict whether or not the federal courts will restrict the applicability of the qualified immunity standard in Economou to constitutional cases.

Pending Cases

There are several recent cases now pending in this Region in which employees of the Boston Area Office have been sued as individual defendants. Those cases are reviewed briefly below.

One Company, Inc., R. T. Eno and Doris C. Eno v. *U. S. Dept. of HUD, et al.* (U.S.D.C., D. Mass., C. A. No. 79-894-T) is an action brought by a business tenant displaced from a building designated as the site of a proposed housing project by the Lowell Housing Authority. Plaintiff allegedly suffered damages as a result of the displacement, and has brought suit against HUD and individual federal officials, including a relocation specialist of the Area Office CPD division, for negligence, trespass, harrassment, fraudulent representations and concealment, and collusion. Plaintiff requests that damages be awarded in excess of four million dollars. Although the relocation specialist is named as a defendant, the complaint contains no allegations whatsoever regarding her involvement or participation in any of the actions alleged in the complaint. Accordingly, we will request that the United States Attorney file a motion to dismiss this employee as a defendant in the case.

Marilyn Piretti v. *Carl Hyman, et al.* (U.S.D.C., D. Mass., C. A. No. 79-622-K) is an action brought by Section 8 existing housing tenants alleging that defendants have violated their due process rights under the federal constitution and by terminating and/or permitting the termination of tenants' Section 8 benefits without good cause, prior written notice, or opportunity for an administrative hearing. The Secretary of HUD and the Boston Area Office Manager are named as defendants in their official and individual capacities. Plaintiffs seek *declaratory* and *injunctive* relief against the HUD defendants, costs, attorney's fees, and "such other additional relief as the Court may deem just, proper and equitable under the circumstances."

Plaintiffs have not, in this action, asserted a claim for damages against individual employees. Plaintiffs are requesting that the acts of the HUD defendants, in enforcing current Section 8 termination procedures, be declared invalid, and that the federal defendants be enjoined from terminating Section 8 existing housing benefits without complying with due process requirements. This is essentially a claim for equitable relief, and such claims are not ordinarily barred by the official immunity doctrine. See *Wood* v. *Strickland*, *supra.*, at p. 997. The Central Office is presently considering a modification to the Section 8 existing housing benefit termination procedures, which was proposed by this office. If that modification is approved, this litigation may be resolved.

Gammal v. Hamrock, et al. (U.S.D.C., D. Mass., C. A. No. 79-1530-T) is an action by a former HUD employee seeking equitable and monetary relief against Boston Area Office officials individually and in their official capacities, based upon alleged violation of his statutory and constitutional rights in connection with the employee's reduction in rank and subsequent discharge from the Department. Plaintiff is seeking compensatory damages from the HUD defendants individually, as well as punitive damages in the amount of $250,000. Since this case involves an alleged violation of plaintiff's constitutional rights, presumably the defense of qualified immunity will be available to the HUD defendants, in accordance with the standards set forth in Butz v. Economou.

Since this is a matter of general concern, I would be pleased to discuss this further at the next EMR meeting.

Marvin H. Lerman

Regional Counsel

HUD-95 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : James R. Kozuch, Vice President Mortgage Finance, NM

DATE: 04 OCT 1979

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel, GF

SUBJECT: FNMA Accelerated Delivery Procedures

This memorandum responds to your memorandum to me dated September 21, 1979 regarding the above subject. We believe that GNMA can utilize an accelerated delivery procedure like that described in Section 211 of the FNMA FHA/VA Mortgage Selling Contract Supplement.

The delayed delivery by the seller of the FHA mortgage insurance certificate, the VA loan guarantee certificate or the recorded mortgage and/or assignment to GNMA does not present a legal problem, as long as (1) the proposed revision of the GNMA Sellers Guide continues to require from the seller, at the time of the seller's delivery of the Mortgage Submission Voucher, a certification that the seller has fully complied with the applicable statutory and regulatory requirements of FHA and/or VA (as contemplated by Section 617 of the GNMA Sellers Guide) and (2) the accelerated delivery procedure clearly contemplates the ultimate delivery to GNMA of all documentation normally required under the Sellers Guide for the purchase of FHA/VA home mortgages.

Section 211.06 of the FNMA FHA/VA Mortgage Selling Contract Supplement provides that, as to FNMA's accelerated procedure, the delivery of documentation normally required by FNMA for its purchase of FHA/VA mortgages is delayed but not waived. FNMA's right to terminate all selling and servicing contracts with the seller and to require a seller to repurchase a loan with incomplete documentation make clear FNMA's expectation of compliance by the seller with FNMA's normal documentation requirements. The inclusion of similar rights in the proposed accelerated delivery procedure for GNMA purchases of FHA/VA home mortgages is necessary to assure

that GNMA realizes in its mortgage purchase transactions its statutorily-required expectation of receipt of FHA-insured of VA-insured mortgages.

We will be happy to assist you in the preparation of revisions in the GNMA Sellers Guide necessary to implementation of the proposed accelerated delivery procedure.

/s/
Deputy Associate General Counsel
Finance and Administrative Law

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO:

28 NOV 1979

Mr. F.G. Gosling
Vice President for Administration
Federal National Mortgage Association
3900 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Mr. Gosling:

On May 7, 1973, the Government National Mortgage Association (GNMA) issued a letter (copy attached) authorizing the Federal National Mortgage Association (FNMA), as cost-reimbursement type contractor for GNMA, to utilize supply sources of the General Services Administration (GSA). This authorization was based upon the contractual agreements existing at that time: the Intercorporate Functional Agreement of September 1, 1968 and the two subsequent amendatory Memorandum Agreements of October 30, 1968 and March 4, 1970, and the authorization expired upon the termination, renewal, or modification of those contractual arrangements. As you know, on October 1, 1977, FNMA and GNMA entered into the Combined Services Agreement (Agreement) which supercedes the previously mentioned contract documents.

Recently a GSA contractor requested that GNMA issue an up-dated letter affirming the authorization granted in 1973. After reviewing the Federal Procurement Regulations (41 C.F.R. Subpart 1-5.901 and 902) and the Combined Services Agreement, which provides for the compensation and reimbursement of FNMA by GNMA, we have concluded that the Agreement does not contemplate the characterization of FNMA as a cost-reimbursement type contractor. Accordingly, the authorization for FNMA to utilize supply sources of the GSA expired on October 1, 1977 when FNMA and GNMA terminated the contractual arrangements described in our May 7, 1973 letter to Mr. Charles Dixon.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

Enclosure

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: 27 AUG 1979

TO : Warren Lasko, Vice President Office of Mortgage-Backed Securities, NS

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel, GF

SUBJECT: Endorsement of Notes Transferred from the First National Bank of Colorado Spring to Piedmont Mortgage and Investment Company, Inc.

You have requested our advice in reviewing the endorsement of mortgage notes from 43 pools which have been transferred from the First National Bank of Colorado Springs to Piedmont Mortgage and Investment Company. This transfer was made with the approval of GNMA in September, 1978. Subsequently in a procedural review of these GNMA-MBS pools performed in the Office of the Custodian, it was noted that the notes had not been endorsed to Piedmont and then endorsed by Piedmont in blank. FNMA advised Piedmont Mortgage that to effect proper transfer, the notes must be endorsed in the manner described above.

In a letter dated June 29, 1979, Mr. Bill Ingels, Senior Vice President of Piedmont Mortgage and Investment Co., Inc., sought approval to insert the word "bearer" into the blank endorsement which presently exists on all the notes. Mr. Ingels forwarded the opinion of Tim McKenna, Esquire, who concluded that the method of endorsement requested by FNMA results in an incomplete instrument and is, therefore, not negotiable.

It is our opinion that in order to effect proper transfer the documents must be endorsed to Piedmont and then endorsed by Piedmont in blank. This method of endorsement is prescribed by the GNMA MBS Guide, Chapter 8-3(a) and Piedmont should so comply. We do not concur in the explanation prepared by Mr. McKenna seeking to alter the endorsement procedure as it cites an inappropriate section of the Uniform Commercial Code (UCC) and fails to recognize the intent behind blank endorsement of notes.

Discussion

Endorsement is a formal act which passes title to the endorser's transferee. Endorsements are of two general types: special and blank. A special endorsement (e.g. pay to the order of Piedmont Mortgage, First National Bank) makes the instrument into order paper. Thus, a special endorsement specifies the person to whom or to whose order the instrument is payable. An instrument specially endorsed is payable only to the special endorsee and may only be negotiated by his endorsement. A blank endorsement (e.g. Piedmont Mortgage) makes the instrument bearer paper. The recipient of a bearer instrument converts the instrument into order paper by specially endorsing it upon transfer. The holder of an order instrument converts it to bearer paper by endorsing it in blank. Thus, a note which states "Pay to the order - Piedmont Mortgage" becomes bearer paper by endorsing it in blank. The method to effect transfer contained in GNMA MBS Guide, 8-3(a), converts the notes from order to bearer paper in the above described two stage process.

Section 3-204(2) of the UCC (1973 C.R.S. 4-3-204(2)) states that an "endorsement in blank specifies no particular endorsee." The MBS mortgage notes, stamped "pay to the order of Piedmont Mortgage" are payable to order. Upon endorsement in blank, the notes become payable to bearer and may be negotiated by delivery alone until specially endorsed.

Aside from the MBS Guide requirement and the applicability of the UCC, GNMA requires this method of endorsement to assure itself and subsequent holders that there is a clear chain of title and an easily traceable audit trail. Accordingly, for all the reasons discussed above, we recommend that Piedmont insert its name on the notes as special endorsee and then endorse the notes in blank.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Warren Lasko, Vice President
Mortgage-Backed Securities

DATE: SEP 5 1979

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel

SUBJECT: Transfer of Issuer Responsibilities: Requirements for Assignment of Mortgages

This is in response to the request of Paul Yates for a legal opinion as to whether a subsidiary that has transferred GNMA mortgage pools and other assets to its parent must execute individual assignments of the pooled mortgages for recordation by the parent.

Suburban Coastal Corp. (Suburban), an approved issuer of mortgage-backed securities, acquired all the stock of MTS Mortgage Corporation (MTS), another approved issuer. As sole share holder of MTS, Suburban voted to transfer all assets of MTS to itself. A Bill of Sale and Assignment was executed to evidence the assignment and was duly recorded. MTS has filed a plan of liquidation with the Internal Revenue Service which provides that MTS will remain in existence for no more than three years to wind up its business and affairs and to distribute its assets.

The legal question presented is whether the transfer is a transfer of issuer responsibility of the kind contemplated in Section 2-7 of the GNMA Mortgage-Backed Securities Guide. That Guide provision requires the original and substitute issuers to "file for record assignments of mortgages from the prior to the substitute issuer for each mortgage in the pool. . ."

It is our opinion that the transfer as described falls squarely within the scope of Section 2-7. Therefore, the parties must comply with GNMA's assignment requirements.

Section 2-7 contemplates a transfer of pools between two separate business entities. Because MTS retains its status as a corporate entity, it cannot avoid the requirements of Section 2-7. The parent-subsidiary relation between the two entities does not insulate the parties from compliance with the procedures set forth in Section 2-7 of the MBS Guide. Suburban's control of MTS is irrelevant to the effect of the sale of MTS's mortgage pools upon the chain of title to the pooled mortgages. If a consolidation of MTS with Suburban had occurred under Texas law, with Suburban remaining as the surviving corporation, we would not find assignments necessary. In the case of a merger or consolidation, Texas law is very clear that title to interests in real property vests in a surviving corporation by operation law without the need for individual assignments.

As we are not aware of any similar statute governing the sale of MTS's interest in the pooled mortgages to Suburban, we are unable to recommend a waiver of section 2-7 of the MBS Guide given GNMA's strong interest in maintaining a clear chain of title.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

SEP 25 1979

Robert Klein, Esquire
1500 Walnut Street
13th Floor
Philadelphia, Pennsylvania 19102

Dear Mr. Klein:

This is in response to your telephone inquiry concerning the rights incident to a second trust lien subordinated to a VA-guaranteed single-family first trust (hereinafter "mortgage") loan included in a GNMA pool. You have indicated that you are representing an investor interested in purchasing such second trust liens.

Subordinated financing may come into play in connection with a prospective GNMA pool loan in one of two ways. On the one hand, a mortgagor may enter into a second trust arrangement at the time of purchasing his residence in order to permit the purchase of the home in the first instance. On the other, a mortgagor may obtain a second trust loan for a variety of purposes at any time after the purchase of the home. GNMA is ultimately concerned with only the first case.

In terms of pool eligibility, GNMA will accept a VA loan with a second mortgage outstanding if: (1) the loan amount on the first mortgage does not exceed $100,000, (2) the second mortgage arrangement meets VA requirements, and (3) the combination of VA guaranty and cash downpayment equals 25 percent of the sales price of the home. These requirements are set forth in chapter 3 of the GNMA Mortgage-Backed Securities Guide, and we have enclosed a copy of the chapter for your files.

Basically, the VA requires the real property securing the first mortgage to have VA-certified appraised value high enough to cover the second mortgage. In addition, the second mortgage must amortize over the same life as the first mortgage or, if a term shorter than the first mortgage is used, the second mortgage must amortize at a 30-year rate and require a balloon payment at the end of the term.

As you know, one of the basic tenants of the Mortgage-Backed Securities program is the need to keep a mortgage pool fully collateralized to assure the payment of securities holders. Accordingly, the MBS program is structured so that an issuer, as opposed to an ordinary mortgagee, may not compromise in any way the rights attendant to a first mortgage lien. Accordingly, a potential investor should weigh this attribute of the MBS program carefully before deciding to purchase mortgages subordinated to pooled VA loans.

Please contact this office again if you have any further questions

Sincerely,

Marilyn G. Wagner
Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

IN REPLY REFER TO:

OCT 19 1979

Mr. Hugh I. Biele
Vice President and Senior Counsel
United California Bank
Los Angeles, California 90051

Dear Mr. Biele:

This letter responds to your letters dated June 20 and August 21, 1979. Pursuant to your request, we have reviewed the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce, Publication No. 290. ("Publication No. 290") We also have discussed with appropriate GNMA personnel the merits of your suggestion that the form of letter of credit approved by GNMA [at Appendix 56 of the Mortgage-Backed Securities Guide, GNMA Handbook 5500.1 REV-4 (hereafter the "Guide")] be revised to incorporate by reference Publication No. 290.

Fred Taylor, Executive Vice President of GNMA, has directed me to advise you that for the present a letter of credit issued for GNMA's benefit may not incorporate Publication No. 290 by reference.

In our view, GNMA requires a "clean" letter of credit and not a "documentary" letter of credit. A clean letter of credit requires the beneficiary to present only a draft or demand for payment and no other documents. Thus, GNMA, as beneficiary under a letter of credit issued in accordance with Appendix 56, merely has to present a draft to the issuing bank. A documentary letter of credit, on the other hand, requires that the demand be accompanied by additional documents (such as bills of lading) which prove an underlying (usually, sales) transaction. Since Publication No. 290 focuses on customs and practice for documentary letters of credit, we do not regard it as entirely relevant to the credit transaction contemplated by GNMA.

In our analysis of Publication No. 290, we have determined that some provisions of Publication No. 290 would be helpful in clarifying rights in ways which are not harmful to GNMA's interests, while certain other provisions would not be favorable to GNMA. Also, because GNMA operates the mortgage-backed securities program on a national basis, it has an interest in the application of a uniform body of law to the definition of its rights and obligations under its program documents, including Appendix 56 to the Guide. GNMA and its issuers generally rely in part upon the Uniform Commercial Code for such definition. We would want to assure that incorporation of Publication 290 did not preclude continuing reliance upon the Code.

Based on our analysis, we may allow a partial incorporation of Publication No. 290 into GNMA's letter of credit form at some future time. However, we are reluctant to do so immediately, because HUD's Inspector General is conducting a nationwide investigation of problems and abuses in connection with certain HUD letter of credit practices. After we have reviewed the results of this investigation, we will reconsider the language in GNMA's letter of credit form.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

Enclosures

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

0 1 NOV 1979

IN REPLY REFER TO:

William Tisch, Esquire
Sandler & Rosen
Suite 510 Gateway West
1801 Avenue of the Stars
Century City, California 90067

Dear Mr. Tisch:

This is in response to your notification that the Continental Illinois National Bank and Trust Company of Chicago (Continental) has served a demand letter on the Weyerhaeuser Mortgage Company (Weyerhaeuser) essentially asking for the payment of future servicing income attributable to GNMA mortgage pools originated by the Reliance Mortgage Corporation (Reliance). We understand that the basis for the demand is the purported perfection of a security interest in various items relating to Reliance's former mortgage pools, including rights to future servicing fees.

Continental has similarly directed GNMA to pay Continental all funds received or held by GNMA for the benefit of Reliance. The funds are described as the proceeds of property enumerated in a financing statement filed in Colorado on May 18, 1979.

We advised Continental that GNMA has not received and does not hold for the benefit of Reliance any property or proceeds in which Continental claims a security interest, or in which Continental can claim a security interest. A copy of GNMA's response to Continental is enclosed for your review.

Reliance had no authority under its guaranty agreements with GNMA to grant the type of security interest in GNMA pooled mortgages that Continental is trying to enforce. An issuer can hypothocate its rights to servicing income only to the extent its fees are earned. Therefore, any hypothocation is subject to GNMA's right, upon an issuer's contractual default, to extinguish any redemption, legal, equitable, or other right, title and interest of the issuer in the mortgages pooled under its guaranty agreements.

GNMA declared Reliance in default of its issuer's obligations by hand delivery of a letter of extinguishment to the Company on May 21, 1979. Upon the delivery of that letter, all authority and power of Reliance regarding its GNMA pools vested in GNMA. Accordingly, GNMA acquired full authority to transfer Reliance's issuer responsibilities and rights to future servicing income to any qualified housing and home finance institution free and clear of any purported security interest in any future servicing income that Reliance may have earned. As you know, GNMA in fact did transfer issuer responsibility to United First Mortgage Company. The bases for GNMA's actions are set forth in Part 390 of Title 24 of the Code of Federal Regulations, the GNMA Mortgage-Backed Securities Guide, and the guaranty agreements between GNMA and Reliance.

In light of the foregoing, we conclude that Weyerhaeuser will take the former Reliance pools subject to no outstanding claims to its future servicing income.

Sincerely,

/s/ Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

Enclosure

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

TO : Warren Lasko, Vice President for Mortgage-Backed Securities, NS

DATE: DEC 5 1979

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel, GF

SUBJECT: Request for Legal Opinion to Write-Off Outstanding Advances: (1) Northwest Guaranty Savings and (2) New England Merchants National Bank

This is in response to your request that we review certain transactions involving two GNMA issuers, Northwest Guaranty Savings (Northwest) and New England Merchants National Bank (Bank) to determine whether GNMA should pursue claims against these issuers or write-off the outstanding advances. Funds advanced to each of these issuers have been carried on GNMA's books as receivables. We agree with your conclusion that the monies advanced to these issuers by GNMA under the MBS program are not the appropriate subject of legal action and should be "written off" on your books. It is our opinion that the advances made to Northwest are uncollectable and may be charged off against the GNMA reserve fund. The "advances" to the Bank should have been carried on GNMA books as an expense of the MBS program and not as a claim against the Bank. A discussion of both cases follows.

In conjunction with our review of the issuers' files and discussions with your staff, we have reviewed the procedures detailed in 24 CFR §17.20, Collection of Claims by the Government under the Federal Claims Collection Act of 1966 and the July 3, 1979 opinion of the Comptroller General of the United States concerning the authority of GNMA to settle claims arising out of its activities. That opinion held that GNMA, under proper circumstances, has broad authority (derived from its Charter Act) to settle or compromise all claims. However, HUD regulations authorize the Assistant Secretary for Administration to exercise the powers and perform the duties of the Secretary of HUD to compromise, suspend or terminate collection action on all Departmental claims not exceeding $20,000 except as provided in 24 C.F.R. §17.25(b). The exception in §17.25(b) provides that where initial collection attempts are not successful, certain claims not exceeding $20,000, may be compromised, suspended or terminated by the office primarily responsible for the program out of which the claim arises. A claim arising out of the operational activities of GNMA are included in this exception (24 C.F.R. §17.25 (b)(4)).Therefore, we conclude that GNMA may compromise, suspend, or terminate any collection action not exceeding $20,000 as long as the claim does not contain any indication of fraud, violations of anti-trust or tax laws, or subject to an exception made by GAO. A separate memorandum will discuss the authority of GNMA to compromise or terminate claims exceeding $20,000. However, certain standards enunciated in GAO and HUD Regulations are applicable in the decision to terminate or forego collection activities.

The standards applied for the termination of collection actions are: (a) inability of the Government to collect or enforce any substantial amount from the debtor due to his financial condition or prospects; (b) inability to locate the debtor and lack of security remaining to be liquidated; (c) cost of collection action will exceed the amount of recovery; (d) claim is legally without merit; and (e) claim cannot be substantiated by evidence (4 C.F.R. §§104.3; 24 C.F.R. §17.34(b)).

Northwest Guaranty Savings

Northwest was an issuer of GNMA mortgage-backed securities which was placed into receivership by the Federal Savings and Loan Insurance Corporation (FSLIC). GNMA advanced its funds to pay security holders and transferred the pool held by Northwest to a substitute issuer. GNMA filed a claim to recover the advances made by it on behalf of Northwest. In a June 1, 1976 letter from Burroughs B. Anderson, GNMA was notified that the FSLIC, acting as receiver, had rejected GNMA's claim, for the recovery of advances from Northwest. At that time GNMA apparently determined that it would not appeal the decision of the FSLIC and GNMA carried the uncollected amount of $5,974.71 on its books as an outstanding receivable.

The FSLIC has liquidated Northwest by marshalling all of its known assets and paying its obligations. Since the FSLIC has rejected GNMA's claim and the corporate entity has been dissolved, collection activity will not result in any recovery from the debtor. Based upon the financial inability of Northwest Guaranty to reimburse GNMA for any of the advances and the small amount of the claim, we have concluded that termination of collection activities is reasonable under §17.34(b)(1) and (3). Thus, we believe that these are proper circumstances under which GNMA may terminate the claim.

New England Merchants National Bank

Our review of the circumstances surrounding the advance of $535,997.03 to the Bank suggests that it is inappropriate for GNMA to pursue recovery of these advances. As you may recall, the Charles River Park "D" project loan which secured the pool was plagued by construction delays and rising costs of labor and materials. These circumstances precluded the project from timely completion within the original mortgage limits. Two mortgage increases were approved by FHA and funded by the Bank. The security holders objected to the mortgage increases and brought suit against the Bank, the security dealer, and GNMA.

When a third mortgage increase was requested by the mortgagor, the Bank notified the Department of Housing and Urban Development and GNMA that without an indemnification agreement, it would refuse to fund the mortgage increase. The Bank intended to declare the mortgage in default and assign the mortgage to the Secretary in order to obtain the insurance benefits needed to pay security holders. HUD advised GNMA that the project was viable and requested that GNMA formulate a plan to prevent the assignment of the mortgage. GNMA requested that the Bank seek advances from GNMA under the terms of the Guaranty Agreement to pay the security holders. The Bank acceded to this request and was "declared" in default of the Guaranty Agreement. GNMA extinguished any redemption, right, title or interest of the Bank in the pooled mortgage and GNMA became the substitute issuer. The loan was assigned to GNMA and funds secured to complete the project. The Bank was retained by GNMA as servicer to assume all servicing responsibilities and to disburse the funds made available by GNMA.

It is our opinion that the Bank accommodated GNMA and the Department by agreeing not to assign the mortgage. The declaration of default resulted from the demand for advances made by the Bank as requested by GNMA. The Bank had the option to assign the mortgage and to avoid (potentially) the declaration of default. Thus, the advances made by GNMA to the Bank are not claims subject to recovery from the Bank. These amounts properly are classified as an expense incurred by the MBS program and, as such, are not subject to the standards mentioned above for the termination of collection actions. The advances were based upon your business judgment that the completed project would be a viable operation and the costs incurred were in concert with the Department's mission.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: DEC 11 1979

TO : Fred Taylor, Executive Vice President, NM

IN REPLY REFER TO:

FROM : Irving P. Margulies, Office of General Counsel, GF

SUBJECT: Computer Power, Inc.

This is in response to your memorandum of November 29, 1979 in which you request an opinion on the legal relationship between GNMA and Computer Power, Inc. (CPI), a provider of computerized record keeping services to about 65 GNMA issuers. We understand that CPI, a wholly owned subsidiary of the Chase Manhattan Bank, contracts with certain GNMA issuers to perform all record keeping and reporting functions required of issuers under the GNMA Mortgage-Backed Securities Guide (MBS Guide). GNMA currently permits issuers to delegate the preparation of mandatory reports but only to other issuers which are then regarded as sub-contract servicers. Your specific question is whether GNMA has any legal authority to supervise CPI through the monitoring of its financial operations of otherwise. CPI is not, and has never been, a GNMA issuer.

It is our opinion that GNMA may exercise no direct supervisory authority over CPI or any other similar enterprise. GNMA is neither authorized by statute nor permitted by contract to regulate CPI's affairs as they impinge on the MBS program. GNMA may, however, exercise indirect control over CPI's activities through its regulation of issuers. This end can be accomplished in much the same way GNMA controls the responsibilities of financial institutions serving as GNMA custodians. As an example of its indirect authority, GNMA can prohibit issuers from dealing with CPI by finding that CPI is not an eligible sub-contract servicer.

Pursuant to Section 4.20 of a GNMA guaranty agreement an issuer may delegate its pool administration responsibilities "only to the extent sub-contract servicing is specifically authorized by the [MBS Guide]." Section 2-1 of the MBS Guide currently permits sub-contract servicers to perform such issuer functions as:

1) receiving and depositing mortgagors' monthly payments,

2) paying mortgagors' taxes and insurance premiums,

3) advancing funds to issuers for payment to securities holders of amounts due, including foreclosure expenses unreimbursed by FHA or VA, and

4) preparing (but not submitting) monthly accounting reports for GNMA.
[Emphasis added.]

Although the MBS Guide permits a delegation of function, it requires an issuer to remain fully responsible for pool administration and liable for the performance of the sub-contract servicer. Further, the issuer may employ only one sub-contract servicer per pool and must obtain GNMA's prior written approval for every sub-contract servicing arrangement.

Issuers contracting with CPI appear to be violating the provisions of Section 2-1 of the MBS Guide in at least two and possibly three respects. First, the issuers are delegating an issuer responsibility to a non-issuer. Second, they are delegating their authority without GNMA's prior written approval. Third, some issuers may have more than one sub-contract servicer per pool because the MBS Guide does not preclude a sub-contract servicer from using a CPI-type firm.

GNMA may either prohibit issuers from using CPI-type firms or adapt its program to accommodate and control the use of such services. If the latter approach is taken, we recommend that GNMA:

1) Expand the definition of sub-contract servicer to encompass firms providing computerized record keeping services,

2) Amend the MBS Guide to require issuers to use a "letter agreement" form drafted by GNMA when contracting with record keeping sub-contract servicers,

3) Amend the MBS Guide to set forth general eligibility requirements for this kind of sub-contract servicer (either in the form of a general performance standard or specific criteria),

4) Revise the MBS Servicing Agreement (HUD form 1707) to indicate what function(s) a sub-contract servicer will be performing for an issuer,

5) Clarify Section 2-1 of the MBS Guide as to whether an approved sub-contract servicer may contract with a computerized record keeping service.

Please let me know if you have any questions. We will be glad to help GNMA draft the proposed MBS Guide changes and forms if a decision is made to formalize the use of computerized record keeping firms.

Marilyn G. Wagner

Associate General Counsel
Finance and Administrative Law

HUD-95 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

TO : James R. Kozuch, Vice President
Office of Mortgage Finance, NM

DATE: AUG 29 1979

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel, GF

SUBJECT: Stanford Apartments: Substitution of United States Treasury Bearer Bonds in Lieu of Cash

You have asked our advice in a matter brought to your attention in a letter dated July 12, 1979, from Horace J. Rodgers, attorney for the mortgagor-contractor of the above-cited project. GNMA is the mortgagee. The issue presented is whether or not a mortgagor may substitute United States Treasury Bonds for a surety bond or for cash to back up a Completion Assurance Agreement. While we have determined that HUD is obligated to accept Bearer Bonds in lieu of a surety bond, (6 U.S.C. §15) Mr. Kopecky's legal memorandum of December 5, 1978, stated that a cash deposit is the only acceptable method of funding a latent defects escrow. Although there is evidence that cash is contemplated by the FHA regulations, the FHA forms and conduct in the field offices do not support that view.

FACTS

The project, located in Southfield, Michigan, was completed recently and Final Closing on the project occurred on July 26, 1979. Pursuant to HUD regulations, the mortgagor was required to "furnish assurance of completion of the project in the form of a personal indemnity agreement, corporate surety bonds for performance, or a completion assurance agreement secured by a cash deposit." (24 C.F.R. §207.19(c)(6)(1979)). GNMA was advised by counsel for the mortgagor that it was unable to obtain a Surety Bond to cover the Latent Defects Guarantee period and offered to deposit United States Treasury Bearer Bonds in lieu of cash under the agreement. According to the mortgagor, the Chicago Regional Office of FNMA advised the mortgagor that such a Treasury Bond was not acceptable. The mortgagor then deposited cash to fund the escrow and requested that GNMA review the matter.

On August 7, 1979, we met with you, Mr. Juara, and Mr. Deutsch to discuss the proposal and to review the memorandum of December 5, 1978, from Mr. Kopecky. Mr. Deutsch notified Mr. Linane that afternoon that, in fact, FHA had not declined to accept the Bearer Bonds. We then contacted Mr. Harrington of the Chicago Regional Office of FNMA who advised us that FNMA had declined to accept Bearer Bonds based upon the GNMA Seller's Guide, Section 604.

DISCUSSION

Both HUD regulations, 24 C.F.R. §207.19(c) and HUD Handbook, Insured Project Servicing, Chapter 4, Section 6 (HUD 4350.1) indicate that cash is contemplated by the FHA for the escrows for assurance of completion as well as for latent defects. However, as a matter of practice in the field offices, surety bonds have been accepted in lieu of cash. Furthermore, upon review of HUD Form 2450, Completion Assurance Agreement, we note that the Completion Assurance Fund, which indemnifies the owner or Lender from expenses, losses or damages suffered as the result of any default by the Contractor in the performance of the Construction Contract, may be composed of either cash, an unconditional letter of credit, or securities of the United States. The Agreement also provides that the Fund will be dispersed upon final endorsement of the mortgage loan except for 2 1/2% of the total Construction Contract which is withheld from the payment of the balance. This 2 1/2% sum is held to guarantee against defects in construction, including but not limited to, latent defects. Since the 2 1/2% sum is withheld from the Fund, we conclude that it may, according to HUD Form 2450, be comprised of cash, an unconditional irrevocable letter of credit or securities of the United States. Furthermore, HUD Regulations, 24 C.F.R. §207.19(c)(6)(1979), require that all types of assurance agreements shall be on forms approved by the Commissioner. Thus, we may presume that the approved form allows the use of securities and that the Commissioner is aware of the current activities of the field offices.

Mr. Deutsch concurred in the view that United States Treasury Bonds were acceptable for funding certain escrow requirements, including the latent defects fund, and requested your comments on proposed regulations, Part 207.19

which permits mortgagees to accept United States Bearer Bonds in lieu of cash. It was acknowledged by Mr. Deutsch that United States Treasury Bearer Bonds offered less risk for FHA or GNMA than pursuing collection of a surety bond. However, where bearer bonds are offered in lieu of cash and surety bonds are not acceptable to HUD, GNMA should continue to over-collateralize the escrow. This is necessary to insure that the value of the government bonds or obligations do not fall below the required minimum which must be maintained in the account.

GNMA's present policy in its treatment of operating deficit escrows and its addendum to the Completion Assurance Agreement should assist the Multifamily Branch in its amendment of the Regulations. We urge you to amend the GNMA Seller's Guide accordingly, and recommend that GNMA accept the United States Treasury Bearer Bonds for this mortgagor.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

AUG 31 1979

James R. Kozuch, Vice President
Office of Mortgage Finance, MM

Marilyn G. Wagner, Office of General Counsel, GF

Camelot Hall Nursing Home VII
Chesapeake, Virginia
FHA No. 051-43045-PM
GNMA No. 8-45-791959-1

This is in response to your memorandum of August 3, 1979 in which you ask us to review a proposed modification of a mortgage GNMA now holds on a nursing home.

The proposed modification of the mortgage, which is insured under Section 232 of the National Housing Act, is part of a novel approach to nursing home finance that is being used increasingly by a large - scale developer. Correspondence between FNMA and the developer reveals that in 1975 FNMA executed an esssentially identical modification agreement on behalf of GNMA. However, FNMA's Northeastern Regional Office opposes this mortgage modification on the basis of certain potential mortgage servicing and marketability problems. Accordingly, it has referred the matter to GNMA for a final determination.

As you know, the normal way to expand a nursing home facility is through a second mortgage loan insured under Section 241 of the National Housing Act. However, the principals of Medical Facilities of America VII, the partnership developing the above captioned project, have preferred in many instances to expand a facility by obtaining an additional first mortgage loan, also insured under Section 232. They obtain all phase II loans through a separate mortgagor here, Medical Facilities of America XIV (the principals behind MFA VII and XIV are the same). In this case, the mortgagees on both phases will also be different as phase II will be financed through the sale of industrial revenue bonds.

FHA has made its commitment to insure the phase II mortgage contingent upon a modification of GNMA's mortgage. As of final endorsement of the phase II mortgage, FHA is requiring the mortgages on both phases I and II to contain cross-default clauses, whereby a default under one mortgage shall be deemed a default under the other. The policy reason for FHA's requirement is obvious -- without the clause the interest the Secretary would acquire upon an assignment or foreclosure would have little or no market value, and in all likelihood the mortgagor on the other, surviving phase would be able to obtain the entire project at a windfall price.

FHA is further requiring each mortgagee to subordinate its lien on its respective phase to a mutual and reciprocal easement granting to the other phase the use, enjoyment, construction and maintenance of all common facilities. The easement is necessary because the mortgagors must contract to operate both phases as a single economic unit and to make all services and facilities of one phase available to the occupants of the other.

The legal question presented is whether the cross-default provision of the modification agreement would impair GNMA's ability to assign or foreclose its mortgage lien. FNMA has raised other questions -- as to whether the entire modification agreement, including the provision for GNMA's subordination of its lien to the easement, would adversely affect the marketability of the mortgage, and whether the operation of the two phases as one economic unit would unduly burden the servicing of the loan. These, however, are not legal questions, and consequently, their resolution is a matter of GNMA's administrative discretion.

It is our opinion that the cross-default provision does not expose GNMA to any unreasonable risk of loss, particularly in light of FNMA's respresentations as to the record of the developer. Apparently, none of the nursing home projects backed by the various MFA partnerships have ever gone into default. However, because the FHA commitment on phase II does not prescribe procedures for the implementation of cross-default provision, we recommend the amendment of the proposed modification agreement to require each mortgagee 1) to notify the other thirty days in advance of any declaration of default, and 2) to permit each mortgagee, at its option, to cure the default within the specified notice period. Although these terms were not included in the earlier modification agreement executed by GNMA under similar circumstances, we believe the specification of procedures will help assure GNMA of the coordination necessary in this type of venture. FNMA's regional office would also regard the mortgage modification more favorably if the foregoing terms were added to the agreement.

We also recommend that GNMA ask FHA to develop standard procedures for the implementation of a cross-default clause and will prepare a memorandum for this purpose. Eventually, FHA's requirements should be included in FHA's insurance commitment as necessary elements of the mortgage modification agreement required for the phased development of nursing homes.

In conclusion, GNMA may exercise its discretionary authority to approve the proposed modification of its phase I mortgage. However, we believe GNMA's interests would be better served if the proposed agreement were amended in a manner consistent with our recommendations.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

OCT 2 2 1979

Associate Regional Counsels for
Private Market Finance

Irving P. Margulies, Office of General Counsel, GF

Certification by Public Housing Agencies

A recent inquiry from an Associate Regional Counsel for Private Market Finance (ARC) questions whether an ARC joins the issuing agent in the certification appearing in the Requisition for Funds Form (HUD-9309) used in group financing in the public housing program. The certification reads:

> In pursuance of the Financing Agreement, we certify that all applicable provisions of each aforesaid Contract . . . have been complied with by the respective Authorities, that no litigation is pending or threatened which would materially affect the planning, development, operation, or financing of any project covered by any such Contract; that no Authority is in default under any of the provisions of any such Contract; and that the people of the locality in which any such project is situated have not . . . indicated that they do not want such project. (Emphasis added).

(This language also appears in the Requisition for Funds Form for individual PHAs (HUD-5402).) Additionally, the ARC asks what should be done if the ARC has information that the issuing agent's certification is inaccurate.

In answer to the first question, it is our opinion that the pronoun "we" in the phrase "we certify" does not create a HUD certification. Rather, the pronoun "we" refers only to the PHAs (or the members of the local governing boards on whose authority PHAs act). Although the ARC reviews forms HUD-9309 and 5402 prior to any disbursements, the ARC's signature is in effect an authorization for the Office of Finance and Accounting to post in their commitment ledger the funds requested and is neither part of nor an affirmation of the certification. The approval goes only to the accuracy of the dollar amounts listed in the forms.

In connection with the second question, the ARC has no obligation to look behind the certification made by the issuing agent. If the ARC has firsthand information that the certification is inaccurate, however, the ARC should communicate the circumstances to this office so that a determination can be made as to the course of action that must be taken.

It also should be noted that any revision to the certification in either form without central office approval is to be discouraged. If circumstances necessitate an exception, the ARC should immediately contact this office.

Associate General Counsel
Finance and Administrative Law

HUD-96 (7-78) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

TO : Fred Taylor, Executive Vice President, NM

DATE: NOV 8 1979

IN REPLY REFER TO:

FROM : Marilyn G. Wagner, Office of General Counsel, GF

SUBJECT: GNMA Authority to Execute a Contract with the Federal Reserve Bank

By memorandum dated October 30, 1979 your office asked for an opinion on the Government National Mortgage Association (GNMA) authority to execute a contract with the Federal Reserve Banks. The basis for this request is a letter received from the Federal Reserve Bank of New York advising you that a subcommittee on fiscal agency operations acting on the behalf of all Federal Reserve Banks is currently negotiating agreements for service commitments and for reimbursement for all costs of providing such services.

The memorandum of agreement requested by the subcommittee is basically to establish:

1. an agreement whereby the Federal Reserve Bank acting as fiscal agent will provide services to GNMA for which GNMA will reimburse the Federal Reserve Banks;

2. the identification of the fiscal agent services to be rendered with the understanding that the banks intend to assure that the service requirements specified by GNMA are satisfactorily fulfilled;

3. full reimbursement for costs incurred by the Federal Reserve Banks in rendering fiscal agent services to GNMA with the understanding that GNMA intends to insure that the costs as specified by the banks are fully reimbursed;

4. an agreement and complete the necessary preliminary work in order that satisfactory service will be rendered and full reimbursement provided effective January 1, 1982 or the beginning of the approximate fiscal year thereto.

In connection with the memorandum of intent three distinct categories of service are outlined: Fiscal Agent Services (e.g. issuance of securities); Banking Services (e.g. clearing of checks); and Central Bank Services (e.g. issuance of currency). The subcommittee has requested that you execute a letter of intent similar to that executed by the fiscal assistant secretary for the fiscal services of the United States Treasury.

It is our opinion that GNMA has the statutory authority to enter into the proposed memorandum of agreement that the subcommittee has requested of you. GNMA may enter into and perform such contracts on such terms as it may deem appropriate with any association. It may also execute all instruments necessary or appropriate in the exercise of this power. (see 12 U.S.C. 1723a(a)).

Additionally, GNMA may utilize the services of the Federal Reserve Banking system and reimburse the banks for such services. Section 309(d) (12 U.S.C. 1723a(d)) provides that, with the consent of the Federal Reserve Bank, GNMA may avail itself on a reimbursable basis of the use of information, services, facilities, officers and employees including any field service in carrying out the provisions contained in Title III of the National Housing Act.

The agreement requested by the subcommittee falls within this latter authorization. We have reviewed your letter to the Subcommittee on Fiscal Agency Operations and are of the opinion that you may execute the memorandum of agreement attached to that letter. If you have need for further information concerning this matter I will be happy to discuss it with you.

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

DEC 3 1979

IN REPLY REFER TO:

Mr. Lewis S. Ranieri
Partner
Salomon Brothers
One New York Plaza
New York, New York 10004

Dear Mr. Ranieri:

This responds to your concerns regarding Salomon Brothers' release of certain GNMA market forecasting materials to George Anderson, Director of Corporate Planning for the Government National Mortgage Association (GNMA). I understand that Salomon Brothers has agreed to loan these forecasting materials to GNMA to facilitate GNMA's development of similar market forecasting tools. Your company, however, has asked for assurances that the materials which it furnishes will not be subject to a request for records under the Freedom of Information Act (FOIA), 5 U.S.C. §552.

We have determined that those materials that you would make available to Mr. Anderson could be exempted from disclosure under the FOIA pursuant to Exemption 4, which applies to "commercial or financial information obtained from a person and privileged or confidential."

Commercial and financial information is confidential within the meaning of Exemption 4 if the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future, or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Accordingly, if GNMA would have to entertain an FOIA request covering your company's forecasting materials, it would have a sound basis for concluding that the materials should not be disclosed under the FOIA.

In addition, we also think that disclosure of the materials of GNMA would be precluded under the Trade Secrets Act, 18 U.S.C. §1905. That Act provides:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment."

HUD has determined as a matter of policy in light of the Supreme Court's recent decision in Chrysler Corporation v. Brown that it will not disclose any records falling within both Exemption 4 of the FOIA and the Trade Act. We, therefore, believe that the confidentiality of your materials is subject to adequate safeguards and hope that you will make them available to GNMA as they would be of significant assistance to Mr. Anderson in his endeavors and thus to participants in the GNMA program. GNMA, however, cannot provide an absolute pledge that it will not be required by law to release some or all of the documents that it holds in temporary custody in the course of responding to any FOIA request. Nonetheless, the likelihood that GNMA would be compelled to release the materials appears remote.

Please let me know if you have further questions.

Sincerely,

Marilyn G. Wagner

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

2 JUL 1979

Mr. Ira L. Burleson
Vice Chairman of Board
and General Counsel
Liberty National Life Insurance
Company
P.O. Box 2612
Birmingham, Alabama 35202

Dear Mr. Burleson:

Pursuant to your request, we are furnishing you with the enclosed materials concerning the taxability under state law of various obligations guaranteed by the Government National Mortgage Association. Included are opinions from the offices of the Attorney General of North Carolina, the Controller of the Treasury of Maryland, and the Commissioner of Revenue of Florida. Our inquiries to the Public Securities Association, the Mortgage Bankers Association of America, and several major brokerage houses have failed to uncover any more comprehensive survey of how the states treat GNMA mortgage-backed securities for tax purposes. Our research, moreover, has disclosed no case law on the subject.

As the basis of your inquiry, you cite the decision of the Illinois Department of Revenue to include in the computation of the capital stock tax the value of GNMA mortgage-backed securities held by Liberty's wholly owned subsidiary located in Illinois. The issue you raise is whether the Department of Revenue has properly determined under the applicable state tax statute or rule that GNMA mortgage-backed securities are not excludable from the calculation of the subsidiary's capital stock tax as "obligations of the United States" within the meaning of 31 U.S.C. §742.

The Office of General Counsel, as a matter of long-established policy, regards the determination of any particular state with respect to the taxation of a GNMA mortgage-backed security as a matter of purely state concern. It appears that state taxation of GNMA mortgage-backed securities, or any interest earned thereon, is not precluded under 31 U.S.C. §742, just as it is not precluded by a specific tax exemption under Section 306(g) of the National Housing Act.

31 U.S.C. §742 provides as follows:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

The Supreme Court has held that the phrase "other obligations of the United States" should encompass only those securities of the same type as those specifically listed in the above statute, that is, interest bearing obligations issued by the United States and backed by its full faith and credit. Smith v. Davis, 323 U.S. 116 (1944). The Supreme Court stated further that the Congress intended to shield from state taxation only those Federal interest-bearing obligations "needed to secure credit to carry on the necessary functions of government," an intent, the Court concluded, that the judiciary should not expand or modify. Id. at 119.

Accordingly, it appears that the immunity of an interest-bearing security from state taxation i automatic merely because the United States backs the obligation to guaranty the security with its full faith and credit. Rather, a finding of immunity requires further analysis which must begin with an inquiry into the kind of tax involved. This inquiry is basic because §742 excludes from immunity both nondiscriminatory franchise or other non-property taxes on corporations and inheritance or estate taxes.

In light of the foregoing, a state decision to impose a direct or indirect franchise, income or property tax on GNMA mortgage-backed securities does not appear to be prohibited by 31 U.S.C. §742 or by the National Housing Act.

Sincerely,

(signed) Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

Enclosures

READEX FICHE best copy available

1 AUG 1979

Marilyn Melkonian, Deputy Assistant
Secretary

Irving P. Margulies, Office of General Counsel

Federal Tax Treatment of Certain Condominium Funds

In your memorandum of May 9, 1979, you request that we review a Notice of Proposed Rulemaking issued by the Internal Revenue Service, 44 F.R. 1985 (January 9, 1979), concerning income tax treatment of homeowners associations. You also ask that we seek a ruling from the Internal Revenue Service or an amendment to the proposed rule if necessary to clarify the tax treatment of contributions to working capital funds by the initial purchasers in Federally assisted condominium projects. We have concluded that these working capital contributions are not likely to be taxable income to condominiums and therefore we suggest that neither a ruling nor an amendment to the proposed regulations is necessary at this time.

We will not repeat the analysis contained in our memorandum of October 30, 1978, on this issue (which is attached and to which we refer you), although we would like to reemphasize the inadvisability of having any HUD personnel purport to give to the public any advice regarding the income tax consequences of economic transactions arising out of HUD-related investment or activities. However, since our October 30 memorandum was written, a number of questions raised in that memorandum or subsequently have been clarified. These clarifications occured both through our review of the proposed regulations cited above and through our meetings and discussions with representatives of the Internal Revenue Service and FHA. We discuss below the outstanding issues perceived and our analysis of them.

Use of the Working Capital Contributions

The standard form documents for Federally assisted condominium projects are somewhat vague as to the current use of the initial working capital fund contributions. In addition, as we pointed out in our memorandum of October 30, the materials developed by the Interagency Condominium Task Force do not provide much insight into future plans for the contributions. In general, the documents indicate that the contributions are intended to cover common area operating expenses during the initial months of the project. Our discussions with your office indicate that in practice the funds are used for expenditures such as the following:

1) Salaries of supervisory and staff employees responsible for the operation and maintenance of common condominium property.

2) Supplies and equipment necessary for operation and maintenance of common condominium property.

3) Insurance premiums and real estate taxes on common condominium property.

Membership contributions for all of the above uses are clearly not taxable income to a condominium association under the above cited proposed rulemaking. In fact, all but the "insurance premium" item are specifically mentioned in the proposed rule. (We understand from the Internal Revenue Service that the final version of these regulations will include a mention of insurance premiums.)

Timing of the Contribution

In our memorandum of October 30, we expressed concern that FHA Form 3279, paragraph 1, stated that the working capital contribution would be paid "at or before conveyance of title." This language concerned us because Section 528 of the Internal Revenue Code made it clear that contributions must come from members in order to avoid being classified as income to the association. Obviously, a person would not be a member of a condominium homeowners association before conveyance of title. The proposed rulemaking does not change our legal views on this issue.

However, we have confirmed with the Internal Revenue Service our view that the actual tax consequences will depend on the facts of the timing rather than in the wording of the legal documents. Thus, the "at or before" language in our FHA Form will present no problem if in fact either of the following is true:

1) The contribution is actually paid over to the association only at closing when title is conveyed; or

2) if the contribution is forwarded to the association before closing, it is kept in a escrow or similar account until closing.

It is our understanding that virtually all FHA working capital contributions will fall into the first category in practice. Those that don't should fit into the second category because of HUD Handbook 4580.1, 5-3(f), which directs that sums received on account of the purchase of condominium units must be held in an escrow account until closing. Therefore, we believe that in practice the phrasing of our FHA Form will present no problem to FHA condominiums. The Internal Revenue Service has indicated that they agree with this view and that they believe it is not necessary to reprint Form 3279 simply to change the language quoted above.

The Class of Contributors

The working capital contribution with which we have been concerned is made only by the initial purchasers of units in Federally assisted condominium projects. There has been some concern that taxable income might result if the association did not require the same contribution from subsequent members. Our analysis of the proposed rule and discussions with the Internal Revenue Service indicate that an assessment against initial purchasers only will not be income to the association as long as the following:

1) all such initial purchasers are so assessed; and

2) the assessment is actually used for appropriate common area expenditures as described above rather than for special privileges or services not available to all members (including subsequent buyers).

Interest on the Contributions

Interest on working capital funds will be taxable to the condominium association as is the interest on any similar operating or reserve fund.

Conclusion

David Jacobson (Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service) the principal author of the rulemaking on homeowners associations, has indicated to us that the Internal Revenue Service recognizes that all well-managed condominium projects (whether Federally assisted or conventionally financed) will require working capital contributions from their initial members. It is his opinion that the proposed rulemaking contains (and the final rule will contain) no language which would have negative tax consequences for the working capital practices of FHA condominiums. Therefore he sees no purpose to our seeking either a ruling or an amendment to the regulations. We agree with his recommendations at this time. However, after the homeowners association regulations are published in final form later this summer, we will want to review the final language to be sure that there has been no change adverse to the interest of Federal housing programs. If the final regulations do contain language which causes us concern, we will then request a ruling on our working capital procedures this fall. However, the value of such a ruling will be severely limited because it would not contain the facts of any specific case. In our request for ruling we would be able to state only HUD's requirements and our general belief as to the common practices involving such matters as the use of the funds and the timing of the contributions. Any Internal Revenue Service ruling letter would certainly state that the tax result in the ruling was dependent upon the facts being exactly as we described them. Any variation from the facts outlined in our request for a ruling could make the ruling useless to a particular condominium project hoping to rely thereon.

Marilyn G. Wagner

Associate General Counsel
Finance and Administrative Law

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

7 AUG 1979

OFFICE OF GENERAL COUNSEL IN REPLY REFER TO:

MEMORANDUM TO: Donna E. Shalala, Assistant Secretary
for Policy Development and Research, T

SUBJECT : Holtzman Amendment to the Internal Revenue Code: 20 Per Cent Investment Tax Credit for Qualified Rehabilitated Residential Buildings

This is in response to your request seeking our view on the Holtzman amendment to the Internal Revenue Code of 1954 (Code) which provides that qualified rehabilitation expenditures for qualified residential rental property are eligible for a 20 per cent investment tax credit beginning January 1, 1980.

Section 38(a) of the Code allows a credit against tax for investment in certain depreciable property. Sections 46 and 48 of the Code establish the amount of the investment credit as 10 to 11 1/2 per cent and define Section 38 property to include the construction or purchase of equipment, elevators, or other tangible depreciable property. The proposed amendment maintains the basic 10 percent credit for Section 38 property, expands the definition of Section 38 property to include qualified rehabilitated residential buildings, and increases the available credit of expenditures for those buildings to 20 per cent. Qualified rehabilitated residential buildings include any building which is: (a) residential rental property where 80% or more of gross rental is derived from dwelling units; and, (b) is a qualified residential building. The credit is limited to 20 per cent of the amount chargeable to capital accounts and is confined to property having a minimum five year useful life.

Currently, when Section 38 property is disposed of or ceases to be classified as Section 38 property prior to the end of its estimated useful life, there is a recapture of the difference between the credit originally allowed and the credit computed on the shorter useful life. The amendment provides that if property no longer is classified as a qualified rehabilitated residential building but qualifies as Section 38 property, then the owner's tax is increased by the amount of the credits allowed by treating the property during the prior years as qualified rehabilitated residential property. However, this recapture is limited: status as a qualified rehabilitated residential building will not be lost if the rental income does not satisfy the 80 per cent test for a period of not more than two consecutive years.

In comparison to the proposed amendment, Section 167(k) of the Code was designed to encourage investment in rehabilitating low and moderate income housing. It permits accelerated depreciation: a five-year tax write-off on straight-line amortization basis of qualified expenditures through December 31, 1981. To qualify for election of this section, the statute requires that the building be held for occupancy by persons of low or moderate income. After the five year write-off period, there is no requirement that the building continue to be so held.

Broadly speaking, the effect of an investment tax credit is the same as if the Department of Treasury paid up to a specified percentage of the taxpayer's expenditure. A tax credit results in an abatement of all or some of the taxpayer's income tax for the year. It is a deduction from taxable income as opposed to a depreciation allowance which is a deduction from gross income. In addition, if a credit exceeds the income tax due, the excess is carried to and applied against the taxpayer's income tax liability for other years.

While this amendment will encourage rehabilitation of residential buildings and provides a direct tax subsidy for taxpayers in all income brackets, we should emphasize that this amendment, unlike that of section 167(k), applies to taxpayers who are rehabilitating dwelling units for residents from any income bracket. This form of tax subsidy is a departure from HUD's policy of focusing housing assistance programs on lower and moderate income households and, due to the loss of revenue, is more expensive for the Department of Treasury.

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

AUG 31 1979

OFFICE OF GENERAL COUNSEL

IN REPLY REFER

Mark Blocher, Esquire
Peck, Shaffer and Williams
First National Bank Building
Cincinnati, Ohio 45202

Re: Mortgagee Letter 79-12

Dear Mr. Blocher:

We have received your letter of July 2, 1979, in which you argue that HUD's first quarterly announcement of yield limitations for the 811 Bond Financing Program should have been promulgated in a formal rulemaking proceeding rather than issued as Mortgagee Letter 79-12. You base your argument primarily on the Administrative Procedure Act, 5 USC §551 et. seq. ("APA"), and the HUD regulations on rulemaking, 24 CFR Part 10. The APA, HUD's regulations and the related body of case law divide agency issuances into several explicit and implicit categories. The most relevant categories for the purpose of your letter appear to be the following:

I. Formal Rulemaking Required.

II. Publication in Federal Register Required.

III. Neither Rulemaking nor Federal Register Publication Required.

We understand you to claim that the 811 yield limitations belong in Category I while we are of the opinion that issuances of this topic belong in Category III. In order to explain our opinion, we will analyze these categories of issuances and their relationship to our announcement on the yield limitations.

I. Formal Rulemaking Required

Sections 552 and 553 of the APA when read together generally require that formal rulemaking procedures be followed for new or amended "substantive rules of general applicability." Rulemaking procedures generally include publication of a notice of proposed rulemaking, public participation in the rulemaking, and publication of the final rule. The "substantive rules of general applicability" relating to the yields for the 811 Bond Financing Program are found at 24 CFR §811.109 and 110. These regulations went through a formal rulemaking proceeding and became effective on April 5, 1979. They provide for no yield limitations on permanent financing if there is a competitive bidding situation where at least two proposals are received. In the case of interim financing and private placement of permanent financing, the regulations provide for the Assistant Secretary of Housing "to set quarterly or more frequently" yield limitations creating a maximum basis point spread from the 20 Bond Index published by the Daily Bond Buyer. The 811 regulations do not require formal rulemaking or even Federal Register publication in connection with the announcement of the basis point differentials. In fact, the preamble to the regulations emphasizes the need for flexibility and timeliness in these announcements:

> However, to increase flexibility in applying the standard, the basis point differential will be set quarterly or more frequently by the Assistant Secretary for Housing. This will permit adjustments as needed to reflect market conditions while providing the field office with a clear standard of what is acceptable. 44 FR 12359 (March 6, 1979) (Emphasis added)

If each announcement of basis point differential had been required to go through formal rulemaking (a process which generally takes several months), private placements under the 811 Financing Program would be held up several times a year as previously announced yield standards moved far from market conditions and rulemaking is needed to set new yields. We doubt that this pattern would be desired by either your firm or your clients.

II. Publication in Federal Register Required

Section 552 of the APA provides that certain agency issuances must be published in the Federal Register for public information even though they are not subject to the requirements for formal rulemaking. Issuances in this category include statements of general policy and interpretations of general applicability. We do not believe that HUD's quarterly announcements of yield limitations fit into this category and we see nothing in your letter which states that you disagree with our position. In effect, this publication provides notice to the affected parties. Your letter indicates that you have had actual notice of the yield limitations and therefore have no complaint on this ground.

III. Neither Rulemaking nor Publication in the Federal Required

Sections 552 and 553 of the APA when read together indicate that certain agency issuances may be excepted from the requirements of both formal rulemaking and informational publication in the Federal Register. Some of these exceptions (such as that relating to agency contracts) have been waived by HUD in its regulations. See 24 CFR §10.1. However, HUD has never waived its right to issue technical or mechanical announcements such as handbooks, notices to the field or letters to FHA mortgagees which describe, analyze or otherwise carry out policies or procedures already provided for in its substantive rules. It is our opinion that Mortgagee Letter 79-12 is such a technical announcement since it merely states yield limitations based on a procedure provided for in previously promulgated regulations. To the extent that you object to this procedure, your comments should have been filed during the public participation period for the rulemaking of the 811 Regulations. Those comments on yield limitations which were received during the comment period were duly analyzed and taken into account before the drafting of the final version of the 811 Regulations.

Although you do not so state in your letter, we assume that you have complained about the yield announcement procedure because you are dissatisfied with the specific basis differentials which were announced. We remind you that these differentials do not apply to permanent obligations which are competitively bid nor do they apply to projects for which Section 8 notification of selection was issued before April 5, 1979. In addition, because these yield announcements will be made quarterly or more frequently, the Assistant Secretary for Housing is constantly monitoring the bond market and gathering material to assist him in his analysis of the appropriate basis differentials. If you have information which would aid the Assistant Secretary in his analysis, we strongly urge you to correspond directly with him.

Sincerely yours,

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

NOV 2 6 1979

Mr. Martin Portnoy
Merrill Lynch, Pierce, Fenner
& Smith Inc.
One Liberty Plaza
165 Broadway
New York, New York 10080

Re: HUD Guarantee of Project
Notes bearing interest rates
in excess of state usury
laws

Dear Mr. Portnoy:

In your letter of November 1, 1979, you asked this office for an opinion on whether HUD can under the United States Housing Act of 1937, as amended, affix its full faith and credit pledge to Project Notes bearing interest rates which exceed state usury laws. The answer to this inquiry depends upon the processing stage at which the bids are received.

Ordinarily, the Associate Regional Counsels for Private Market Finance (ARC) would not accept bids which obviously exceed the applicable limitations contained in state usury laws. Therefore, if bids have been placed, but have not in fact been accepted, the ARC would reject it accordingly.

Where bids exceeding state usury limitations have been placed according to the prescribed procedure, and through some mistake or error have been accepted by both Regional and Central Office, then the Department is obligated to assure the payment of principal and interest on the notes by virtue of the full faith and credit pledge. Under these circumstances, the Department's obligation would remain unaltered even if a court of competent jurisdiction ordered the local issuing agency to cease making payments on the obligations.

Sincerely,

Irving P Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

3 AUG 1979

MEMORANDUM FOR: William A. Medina, Assistant Secretary
for Administration

SUBJECT : Mobile Homes Inspection Fees - Special
Account and Appropriation Status

I. Question Presented

You have asked for our opinion as to whether there is a proper legal basis for establishing a special account in the Treasury for the mobile homes inspection fees, from which expenditures may be made without further Congressional action to pay for the expenses of these inspections. We conclude that there is such a basis. Our reasoning is set forth below.

II. Factual and Legal Background

A. Mobile Home Fees

The mobile home safety standards program is authorized in the National Mobile Home Construction and Safety Standards Act of 1974 (Title VI, Housing and Community Development Act of 1974, Pub. L. 93-383) (the "Act" herein). The program was first implemented in 1976 with the execution of a contract with the National Conference of States on Building Codes and Standards ("NCSBCS" herein). Under this contract, NCSBCS has in HUD's behalf collected a $15 fee for the inspection for compliance with safety standards of each mobile home a manufacturer produces. The inspections are authorized specifically by § 614 of the Act.

HUD has general authority to establish inspection fees of this kind. Section 7(j), Department of Housing and Urban Development Act, Pub. L. 89-174. The mobile home program has specific authority regarding fees in of its enabling legislation, as follows:

> "Sec. 620. In carrying out the inspections required under this title, the Secretary may establish and impose on mobile home manufacturers, distributors, and dealers such reasonable fees as may be necessary to offset the expenses incurred by him in conducting such inspections, except that this section shall not apply in any State which has in effect a State plan under Section 623."

Furthermore, State plans in this program, under which states may assume the Secretary's enforcement role, may not be approved unless they provide -

> "for the payment of inspection fees by manufacturers in amounts adequate to cover the cost of inspections." § 623(c)(6) of the Act.

B. Deposits into the Treasury

Generally, fees collected by the Government are paid into the Treasury as miscellaneous receipts. 31 U.S.C. § 463a. See also, 31 U.S.C. § 484. They are normally deposited into general fund receipt accounts. Such accounts "are credited with all receipts which are not earmarked by law for a specific purpose." Part 2, Treasury Fiscal Requirements Manual, Chapter 1500, Section 1530.10 (T/L 186). In contrast, monies which are "earmarked by law for a specific purpose, but which are not generated from a cycle of operations" should be credited to special fund receipt accounts. Part 2, Treasury Fiscal Requirements Manual, Chapter 1500, Section 1530.15 (T/L 186). Accord, Section 21.1, OMB Circular No. A-34, p.7, July 15, 1976 ed.

C. Withdrawals from the Treasury

No funds may be --

> "drawn from the Treasury but in Consequence of Appropriations made by Law . . . "Art. 1, Section 9, Cl. 7, U.S. Constitution (Senate Document 92-82 (1973), p. 376).

Appropriations are usually made on a periodic basis, and expire by their own terms. Cf., § 401(a), Congressional Budget Act of 1974, Pub. L. 93-344. In some instances, however, appropriations are permanent, and indefinite as to expiration. Cf., description of special fund receipt accounts in the Treasury Fiscal Requirements Manual, which recognizes the possibility in these terms:

> "At the point of collection, these receipts are available immediately or unavailable for expenditure depending upon statutory requirements." Section 1530.15

Permanent appropriations typically are found in enabling legislation rather than appropriation Acts. Cf., OMB Circular A-11, Section 36.4 (5/79 ed.). Such appropriations reflect budget authority -

> "made available each year by virtue of one time or standing legislation and [it] does not require further action by the Congress." OMB Circular A-34, Section 21.1 (p.6, July 1976 ed.).

Indefinite authority-

> "is not stated as a specific sum when the authority is granted but is determinable only at some future date, such as an appropriation of all or part of the receipts from a certain source." OMB Circular A-34, Section 21.1 (p. 6, July 1976 ed.).

In the usual case, the language of a statute will not be ambiguous as to whether a permanent appropriation is authorized. For example, the "Johnny Horizon" antilitter program includes in its enabling authority the following:

> "The Secretary of the Interior shall deposit into a special account all fees collected pursuant to this Act. Such fees are hereby made available for obligation and expenditure for the purpose of furthering nationwide antilitter campaigns." 31 U.S.C. § 488b-1.

The language of the National Mobile home Construction and Safety Standards Act, however, is not entirely clear on whether a permenent appropriation has been made. But, as will be set forth below, the language may properly be construed to reach a conclusion that a permanent appropriation is intended, and the Congressional history supports that conclusion. See, 2A Sutherland Statutory Construction, Sections 46.05 - 46.07 (3rd Ed. Rev.)

III. Analysis

A. The Mobile Home Inspection Fees Authority Would Satisfy the Criteria for Establishment of Special Account.

A special account may properly be established (1) if the receipts are earmarked by law for a specific purpose; and (2) the receipts are not generated from a cycle of operations. Part 2, Treasury Fiscal Requirements Manual, Sections 1530.10 and 1530.15 (T/L 186).

1. Earmarking

The language of § 620 plainly states that there are authorized to be established and imposed-

> ". . . such reasonable fees as may be necessary to offset the expenses incurred . . . in conducting . . . inspections."

This language may be construed to have at least two meanings. One is that it constitutes an earmarking of collections arising from fees. The other would interpret the language quoted above only as a limitation on the level of the fees.

If the language of § 620 does no more than limit the level of fees, however, it would not be needed. As a matter of law, the level of the fees could not exceed the costs of the services, as is the case under the Government's general fee authority; generally, the level of fees must in all events relate to the specific service rendered the specific beneficiary against whom the fee is assessed. F.P.C. v. New England Power Co., 415 U.S. 345 (1974), which construes 31 U.S.C. § 483a, and approves OMB Circular No. A-25. The only specific service to which the fees could relate is inspections. Under National Cable Television Ass'n. v. U.S. 415 U.S. 336 (1974) (decided the same day as the F.P.C. case, supra), a fee which is set on the basis of considerations other than direct costs of the service provided would be excessive, and may be disapproved on grounds that it is an improper tax. These cases were decided in May 1974, five months before the National Mobile Home Construction and Safety Standards Act of 1974 was enacted. The principles articulated in those cases in construing the general fee authority of the government applies with equal force to the specific fee authority in § 620 of the Act. Therefore, the additional language -- "to offset expenses incurred . . . in conducting . . . inspections. . ." -- would not be necessary, since it would not result in a limitation or otherwise change the level of the fees which could lawfully be imposed. Further, there would be no reason to conclude that the added language was intended to codify case law.

A construction of a statute resulting in surplus verbiage is not favored. Singer v. U.S. 323 U.S. 338, 344 (1944). See also, 2A Sutherland Statutory Construction, Section 46.06 (3rd Ed. Rev.). Moreover, if statutory "language is susceptable of two constructions, one which will carry out and the other defeat . . . [the] manifest object [of the statute], it should receive the former construction." 2A Sutherland Statutory Construction, Section 46.05, (3rd Ed. Rev.), relying on Shapiro v. U.S., 335 U.S. 1, 31 (1948). The legislative history discussed in Part E, 3 below, supports the "former construction." Thus, the purpose of the added language must not be to prescribe the permissible level of fees, but rather, in accordance with its literal meaning, the purpose must be to earmark the money collected.

2. Cycle of Operations

When receipts are from a "cycle of operations", they are usually not deposited in a special fund; rather, they go to a "public enterprise" fund. Such a fund is used "to finance a continuing cycle of business-type operations." OMB Circular No. A-34, Section 21.1, page 7, definition of "Funds" and subdefinitions of "special" and "public enterprise" (July 1976 ed.). Generally, a "business-type" operation is understood to be a buy-hold-sell operation, such as FHA insurance or loans for housing for the elderly. The mobile home inspection fees are thus not a part of a "business-type" operation, since all that is involved in this aspect of the Mobile Home program is inspection. This should properly be characterized as a usual governmental function, and not as a "business-type" operation. Accordingly, there is no financing of a cycle of operations involved, and so the second criterion is satisfied.

3. Conclusion

The collections arising from fees imposed under § 620 should be deposited in a special account.

B. The Special Account Assets Should Be Available Without Further Appropriation Action.

1. Generally

As noted above, the Treasury recognizes that funds in special accounts may, or may not, be available immediately for expenditure. Presumably, where funds are permanently appropriated the terms to which the account is subject would include immediate availability. The language of § 620, while not entirely clear, is a sufficient basis upon which to conclude that there is a permanent appropriation from fees collected to fund inspections. The history of § 620, and of appropriations for the mobile homes inspection program, compel the same result.

2. The Permanent Appropriation Language

The language of § 620 permits the Secretary to --

> ". . .establish and impose . . . reasonable fees as may be necessary to offset expenses. . . "

The phrase "as may be necessary to offset expenses . . ." permits the permanent appropriation. In contrast, the analogous phrasing in HUD's general authority to impose and collect fees requires the fees to be:

> "adequate to cover over the long run, costs of inspection . . . " § 7(j), Department of HUD Act, Pub. L. 89-174.

The key word in the § 7(j) language is "adequate", whereas in § 620, the key word is "necessary." While the meanings of these words are not fixed, in this context, "adequacy" is synonymous with "sufficiency." People v. Kiser, 112 C.A. 2d Supp 903, 245 P. 2d 1125, 1126 (1952); 2 Words and Phrases, p. 544; Webster's New International Dictionary of the English Language 2d ed., G. & C. Merriam Co., 1960, p. 31. "Necessary" on the other hand, carries with it another element: it means sufficient plus essential -- crucial to a requirement. Cf., Abraham v. Insurance Co. of North America, 117 Vt. 75, 87 A. 2d 670, 673 (1951); 28 Words and Phrases, pp. 222 ff; and particularly, Webster's, supra at p. 1635.

Accordingly, "necessary" carries with it a higher level of compulsion than does "adequate". The only reason that there could be a higher level of compulsion is: that the costs of inspections are -- on no uncertain terms -- to be funded from the proceeds.

If the fees were not to be relied upon as a source of financing, then the fees could merely be "adequate," as in the § 7(j) language. In this connection, collections under § 7(j) are not relied upon as the source of money for any particular purpose.

Finally, it would be proper to construe the word "necessary" in the context of § 620 as set forth above, notwithstanding the otherwise permissive phrasing of the provision; that is, the Secretary "may" establish fees. But if he does, then they are "necessary to offset the expenses incurred . . . ."

were the word "adequate" substituted in § 620 for "necessary", it would be quite plain that there was no permanent appropriation; arguably, it would then be no more than another, although surplus, reference to the appropriate level of fees. Indeed, "adequate" _is_ used in § 623(c)(6) in connection with the criteria for state plan approval, fairly clearly as an indication of level. By comparison of the § 620 language, to § 623 and particularly to § 7(j), however, it may reasonably be concluded that the term "necessary" is purposefully used; that it means "adequate" _plus_ an element of compulsion; and that a permanent appropriation is therefore intended.

While the foregoing comparison with other fee authority is helpful, a comparison with other appropriation authority will further illuminate the matter. § 627 of the Act contains general appropriation authority, as follows:

> "There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title."

This language clearly authorizes appropriations for any program purpose, including inspections. It has been suggested that since the language of § 627 authorizes appropriations for inspections, § 620 should not be read as making a specific, and permanent, appropriation for this purpose.

Although this seems reasonable, there is ample precedent, even within the confines of HUD program statutes, for parallel, and somewhat overlapping, appropriation authorizations of this kind. Accordingly, a conclusion that the existence of duplicating appropriation authority negates a permanent appropriation is not compelled.

In the Interstate Land Sales Full Disclosure Act, Pub. L. 90-448 ("ILSFD Act" herein), § 1421 contains general appropriation authority in virtually the same language as § 620 of the Act. (The only difference is that § 620 contains the words "the provisions of" and § 1421 does not; this slight distinction would not seem to make a difference here). And, § 1405(b) of the ILSFD Act contains a permanent appropriation of fee collections -

> "to cover all or part of the cost of rendering services under this title. . ."

Thus, under the latter statute, not only is there authority for appropriations for the program, but also a permanent appropriation of collections which can be used to fund all the same costs. The mobile homes permanent appropriation authority, on the other hand, is narrower, in that it may be used only for some program costs, i.e., inspections.

Accordingly, the legislative precedent for general appropriation authority and a permanent appropriation to exist side by side for the same program is clear. And, since fewer activities may properly be funded from mobile home fees than from the Interstate Land Sales fee, the mobile home case presents a less extreme instance of overlapping appropriation authorities appearing in the same program statute than does the Interstate Land Sales case. Therefore, § 620 should not necessarily be read as precluding a permanent appropriation just because § 627 contains general appropriation authority.

On the foregoing basis, the language of § 620 itself, and in comparison with other fee authorities, and other appropriation authorities, may properly be construed as including a permanent appropriation.

3. The Legislative Process

Even if the language of the Act were ambiguous on this issue, a review of the legislative history of the program's statute, and subsequent Congressional performance in the oversight and appropriations processes, leaves no doubt as to the propriety of the conclusion that a permanent appropriation was intended.

a. Enabling Act History

There is direct legislative history that the fees themselves were expected to be used to fund this inspection program.

At the December 5, 1973 session of the Senate Committee on Banking, Housing and Urban Affairs, the Brock version of the Act (S. 1348, 93d Cong., 1st Sess.) and the Proxmire version of the Act (S. 2538, 93d Cong., 1st Sess.) were reviewed. Senate Committee on Banking, Housing and Urban Affairs, Markup Session, Transcript of Proceedings, December 5, 1973 (93d Cong., 1st Sess.) ("Transcript" herein). The Proxmire version contained in § 23 the predecessor of § 620. It contains the same key language, and this provision was ultimately incorporated into S. 3066 (93d Cong., 2d Sess.), the final version of the Act. Senator Williams asked, "Who is going to pay the tab for this inspection?" Senator Proxmire responded, "The inspection fees on the manufacturer is the way I propose it." Transcript, p. 79. The discussion continued:

> "Senator Proxmire. As I understood the proposal in the bill, fees would be imposed by the Secretary of HUD?
>
> Mr. McLean. Under your approach, yes, sir.
>
> Senator Proxmire. On the manufacturers.
>
> Mr. McLean. On the manufacturers.
>
> Senator Proxmire. The way we have meat inspection by imposing fees on the meat packers. Isn't that right?
>
> Mr. McLean. I believe that's correct."
> Transcript, p. 80.

* * *

The reference to meat inspection fees as an analogy is of more than passing interest. Under 7 U.S.C. § 1622(h), meat inspections and grading of meat are authorized, and that statute also authorizes --

> "assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered. . . "

The budget authority for this activity is a permanent indefinite appropriation. Appendix, FY 1980 Budget of the United States Government, p. 195. Since the statutory language in § 1622(h) is no stronger than that in § 620, even if there were nothing more to support it, on this basis alone, the conclusion would be inescapable that mobile home fee collections were intended to be available as a permanent indefinite appropriation.

b. Annual Reporting to Congress

Under § 626(a) of the Act, HUD submits an annual report on the mobile homes program to Congress. The Third Annual Report, which was issued in 1978, contains a full description of the inspection fee system. It states, that the inspection "system is funded entirely by HUD fees paid by mobile home manufacturers." Third Annual Report to Congress on Title VI of the Housing and Community Development Act of 1974 (Mobile Homes), Chapter V, (Operations and Finance), and particularly V-5. Thus, Congress was on notice that the inspection system was funded by the manufacturers' fees, not by periodic appropriations. On the basis of this notice (as well as the appropriations actions noted below), Congress may be said to have ratified the construction of the Act which authorized the foregoing financing. *Brooks* v. *Dewar* 313 U.S. 354 (1941). (Interior practice of issuing temporary permits lawful, even if only permanent permits authorized in the statute, where annual reports and appropriations actions reflect Congressional acquiescence).

c. Appropriations Committee

Excerpts from the fiscal year 1979 appropriation hearings before the House subcommittee follow:

* * *

MOBILE HOME STANDARDS PROGRAM

"Mr. Boland. We will now turn to the Mobile Home Standards Program.

Funds were appropriated for startup costs for this program in 1976 and 1977. No appropriations were requested for 1978 and none for 1979. The fee charged mobile home manufacturers finances the program. A $19 fee is charged to the manufacturers for each mobile home shipped. That is expected to be sufficient to cover the cost of the monitoring and enforcement activities."

* * *

MONITORING AND ENFORCEMENT COSTS

"Mr. Boland. The assessments on the mobile home manufacturers of $19 for each mobile home shipped in 1977 comes to about $4.8 million. What were the costs for the monitoring and enforcement activities for 1977?

Ms. Worthy. $2.2 million, Mr. Chairman, just for the monitoring [i.e., inspections].

Mr. Boland. How about the enforcement activities? Did the monitoring and enforcement activities eat up all the $4.8 million?

> Ms. Worthy. No. There are presently funds that are in reserve that are going to be used for purposes of additional training and other inspection activities.
>
> Mr. Boland. You are satisfied with the $19 fee? Is that a proper level?
>
> Ms. Worthy. At this time we think it is a proper level. We have no indication that it is either too little or too much, and we are going to continue to monitor that to determine within the next year or year and a half, whether or not the fee should perhaps be changed. But we have no plans at this time to change the fee."

* * *

Hearings on the HUD Fiscal Year 1979 Appropriation before the Subcommittee of the Committee on Appropriations, House of Representatives, pp. 267-269 (April 6, 1978).

The foregoing exchanges with Chairman Boland make it very clear that the Committee understands that the fees support the inspection system, and money is not separately appropriated for this purpose. This further confirms HUD's interpretation of a permanent appropriation. U.S. v. Kennedy, 278 F. 2d 121, 126 (9th Cir. 1960) (appropriations made periodically over several years to the National Park Service "virtually ratify" Park Service construction of statute).

d. Conclusion

Congressional performance, in enacting the Act, in oversight activities and in the appropriation process, all demonstrate that the Congress intended, currently knows, and approves a construction of § 620 authorizing a permanent appropriation.

4. Conclusion.

The collections from mobile home inspection fees should be available without further action by Congress in an appropriation Act.

IV. General Conclusion

Chancellor Kent observed that:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion." Kent's Commentaries (13th Ed. 1864) 462, quoted in 2A Sutherland Statutory Construction, Section 46.05 (3rd Ed. Rev., p. 57).

In accordance with the foregoing observation, and based on the language and history of the Act, and subsequent dealings with Congress, a proper legal basis exists to conclude that a special account should be established in the Treasury for fees collected under § 620 of the Act, and the collections in that account should be available to pay for the expenses of inspections without further Congressional action in an appropriation Act.

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

OCT 1 0 1979

Memorandum to: William A. Medina, Assistant Secretary for Administration

Subject: Authority to Reestablish the Administrative Operations Fund, and Make Expenditures from that Fund

I. QUESTION PRESENTED

You have asked us to determine whether there are legal inhibitions to use of a fund established pursuant to the statutory language quoted below in paying for salaries and expenses of HUD absent enactment of an express appropriation for salaries and expenses for fiscal year 1980.

II. BACKGROUND

Section 502(c)(3) of the Housing Act of 1948, as amended (12 USC 1701c(b)(3)) provides:

> Sec. 502. In carrying out their respective functions, powers, and duties--
>
> * * *
>
> (c) The Secretary of Housing and Urban Development* and the Federal Home Loan Bank Board . . . respectively, may, in addition to and not in derogation of any powers and authorities conferred elsewhere in this Act--
>
> * * *
>
> (3) make expenditures for all necessary expenses, including preparation, mounting, shipping, and installation of exhibits; purchase and exchange of technical apparatus; and such other expenses as may, from time to time, be found necessary in carrying out their respective functions, powers, and duties: Provided. That funds made available for administrative expenses in carrying out the functions, powers, and duties imposed upon the Secretary of Housing and Urban Development and the Federal Home Loan Bank Board, respectively, by or pursuant to law may at their option be consolidated into single

---

*The statute was amended to substitute the Secretary of HUD for the Administrator of the Housing and Home Financing Agency.

> administrative expense fund accounts of such officer or agency for expenditure by them, respectively, in accordance with the provisions hereof.

Under that language, the Administrative Operations Fund and its predecessors ("AOF" herein) were established. The Comptroller General has said the following concerning a predecessor to the AOF:

> In the absence of a contrary intent, and none is apparent, the language of section 502(c)(3), supra, must be accorded its ordinary literal meaning. The word "consolidated" is defined in Funk & Fagnalls New Standard Dictionary of the English Language as "United to form a solid mass or one system." The derivative word "consolidate" is defined as "To unite into one common fund; as to consolidate the city's revenue." Also, see 19 Comp. Gen. 257.
>
> In that light, it may reasonably be assumed that the primary purpose of this consolidated account is to wholly integrate the several administrative expense funds available to the Housing and Home Finance Administrator in a common fund account in the interests of economy and flexibility of administration and in furtherance of the realigned functions, powers and duties of such Administrator as defined in the section.
>
> Accordingly, the amounts transferred and consolidated pursuant to such provisions thereafter are not required to be separately used and accounted for as subappropriations for the respective programs under the single account. To the extent the administrative interpretation of section 502(c)(3) appears to be correct. B-109934-OM, September 10, 1952

III. ANALYSIS

A. Repeal

The first question to be addressed is whether the authority for the AOF (a) has been repealed, or (b) has been superseded in a fashion that would make it clear that Congress intends that the fund not be used.

The statute quoted above (a) has not been repealed, and (b) Congress has manifest no intention concerning supersession of the AOF at a time when there is no appropriation Act in effect. In support of the latter point, the history set forth below is helpful.

The AOF or predecessors were used between 1948 and 1977. After the Department of Housing and Urban Development—Independent Agencies Appropriation

Act, 1977 (Pub. L. 94-378) was enacted, the AOF was no longer used, and in its stead an account for the salaries and expenses appropriation was established. The House report commented as follows:

> HUD proposed with the transmittal of the budget estimate a new single account for all salaries and expenses incurred by the Department. In agreeing with this request, the Committee is attempting to simplify the existing complex appropriation account structure. H.Rept. 94-1220, 94th Cong., 2d Sess. 13

The Senate report said:

> . . . In 1976 and prior years funds appropriated in a number of accounts were consolidated in the Administrative operations fund with funds otherwise provided. In 1977 a single appropriation will be consolidated in this account with funds otherwise provided. S.Rept. 94-974, 94th Cong., 2d Sess. 22

There has been no occasion to use the AOF due to the further consolidation and simplification accomplished by the 1977 and later appropriation Acts. However, it is notable that the authority to use a salaries and expenses account ("S&E" herein) in lieu of the AOF, is addressed annually in an appropriation Act; it has not been addressed in permanent legislation. Furthermore, under the authority of the 1948 Act, various monies are drawn into the S&E account annually. Thus, section 502(c)(3) of the 1948 Act has had vitality in every respect, except as to the establishment of the AOF, as against the S&E account.

On the expiration of the 1979 Appropriation Act, the authority to maintain the S&E account would expire. Under the usual rules of statutory construction, the later utterance of Congress supersedes inconsistent prior utterances, and so during the time that authority for the S&E account existed, (fiscal years 1977, 1978, and 1979) an S&E account should have been, and was used, notwithstanding the fact that the AOF authority had not been repealed. Currently, however, no authority to use an S&E account exists, and so the prior utterance—the authority to establish the AOF under § 502 of the Housing Act of 1948—would be the only utterance reflected in law that would affect the Department's operations in this area.

On the foregoing basis, (and absent a Congressional intention that the Depattment be abolished) there would be no doubt that the AOF should be reinstated, except that Congress has before it, and has nearly completed action on the FY 1980 appropriation bill. When action is complete, the authority to use an S&E account, contained in that bill, will (if enacted) once again supersede the authority to use the AOF. Until enactment of the 1980 Act, however, the only authority for payment of salaries is through the AOF.

As indicated above, the AOF authority has not been repealed, and there would seem to be no basis to consider the AOF authority a nullity, simply because the S&E account has been used for three years, and would be used again when a future bill is enacted. Indeed, Congress has demonstrated an interest in having the Administrative Operations Fund superseded only on an annual basis. Were HUD to fail to seek the use of the AOF authority, even if such use were only in the interim between effective appropriation Acts, HUD's inaction would as a practical matter render the 1948 authority on the establishment of the AOF a nullity. HUD would in effect be interpreting this aspect of the 1948 authority as having been repealed, even though Congress has not done so expressly, or by implication. Notwithstanding the pendency of a renewal of the S&E account, such an interpretation by HUD would be inconsistent with the Congressional action in 1948, and the limited, one year actions for 1977, 1978, and 1979 fiscal years. Moreover, such action would give more weight to pending legislation than to the enacted 1948 law.

Accordingly, it is concluded that the AOF authority has not been expressly repealed; the creation of an account as successor to the AOF in appropriation Acts has not repealed the AOF authority by implication; and the pendency of legislation to establish successor S&E accounts whould not be construed as repealing the AOF authority.

B. Expenditure

Upon establishment of the AOF, the next question is whether the funds paid into the AOF may be expended for salaries and expenses.

The AOF has only been a management fund. Contributions to it were made from several sources. The sources which would not be tapped are listed in Attachment A. In connection with each of those sources, there has been authority to make expenditures for relevant expenses, including salaries. The respective authorities of the sources, rather than the authority for the AOF, form the basis for expenditures from the AOF. In some cases, expenditures have been based on these same authorities over a 40 year period. There seems to be no particular reason to question the adequacy of such authority in the current circumstances.

Particular question was raised concerning expenditure of fee income, in light of 31 USC § 483a, which requires fee income generally to be paid into the Treasury. In this connection, HUD's separate authority to collect fees also contains language permitting the expenditure of such incomes for operating expenses of HUD, as follows:

> (j) Notwithstanding any other provision of law the Secretary is authorized to establish fees and charges, chargeable against program beneficiaries and project participants, which shall be adequate to

cover over the long run, costs of inspection, project review and financing service, audit by Federal or federally authorized auditors, and other beneficial rights, privileges, licenses, and services. Such fees and charges heretofore or hereafter collected shall be considered nonadministrative and shall remain available for operating expenses of the Department in providing similar services on a consolidated basis. Section 7(j), HUD Act, 42 USC § 3535(j)

In light of the foregoing, it is concluded that authority to expend money from the AOF stands on no different footing now than it did prior to fiscal year 1977; this authority was not challenged over a period of almost 30 years; and the same authority would be adequate to support expenditures from the AOF now.

IV. CONCLUSION

It is concluded that there are no legal inhibitions to the use of a fund established pursuant to section 502(c)(3), Housing Act of 1948, for paying HUD salaries and expenses absent enactment of an express appropriation for salaries and expenses for fiscal year 1980.

(Signed) S. Leigh Curry, Jr.

S. Leigh Curry, Jr.
Acting Deputy General Counsel

Attachment

3 JUL 1979

Elizabeth Raymond, Assistant to the Secretary for
Labor Relations

Marilyn G. Wagner, Office of General Counsel

Application of Davis Bacon to privately financed items
on § 312 project (Corlies Manor Apts., Poughkeepsie, N. Y.)

This is in response to your memorandum of April 25, 1979, to Christopher Hartenau of this office, requesting an opinion on the above subject. You have asked whether Davis-Bacon wage rates, which are applicable to large multifamily rehabilitation projects assisted by a rehabilitation loan under § 312 of the Housing Act of 1964 (42 U.S.C. 1452b), would apply to privately funded portions of the § 312-assisted Corlies Manor Apartments rehabilitation project. You have indicated that the rehabilitation has been completed and that no payrolls were requested for the private portion of the rehabilitation, and you ask from whom back wages would be collected if Davis-Bacon rates are applicable.

Our conclusions, discussed below, are as follows:

1. The relevant statute imposes on the Secretary the obligation to insure that laborers and mechanics on a rehabilitation project be paid Davis-Bacon wages from the date when the administering Local Public Agency (LPA) receives HUD notification that the § 312 loan has been approved and a fund reservation has been made.

2. The Secretary is to take actions to insure payment of Davis-Bacon wages for work on privately funded contracts as well as § 312-assisted contracts as of the above notification date.

3. It is unclear whether § 312 Handbook permits the segregation of rehabilitation work into private and § 312-funded contracts. In any event, HUD documents fail to impose on the borrower or contractor responsibility for Davis-Bacon

payments on privately-funded contracts, and the borrower and contractor are not otherwise required to insure that such payments are made.

4. In the present case, it appears that only HUD and/or the LPA are responsible for any underpayments on the privately funded contract. An LPA allegation that HUD permitted nonpayment of Davis-Bacon rates on this contract should be investigated.

5. Assuming that appropriate documentation of underpayments were presented, it is doubtful that there is any source of funds within HUD from which back payments to any affected workers could appropriately be made.

6. Section 312 documents require revisinn to insure that the permissibility and oversight of separate privately funded contracts is addressed and the Secretary's Davis-Bacon obligations are carried out.

I. Background

The materials you forwarded indicate that by cover letter dated May 16, 1977, the City of Poughkeepsie made a request for a "Section 312 Loan Fund Reservation" in the amount of $900,000 for rehabilitation of the 292-unit Corlies Manor Apartments, which consists of 73 buildings with four units per building. The letter indicates that the approximate total cost of the proposed rehabilitation is $1.5 million and that the owners, C. B. Strain and Son, a plumbing and heating contractor, would be spending $600,000 of their own funds to complete the non-federally funded portion of the rehabilitation. (The owners in fact were Corlies Associates, a partnership consisting at least in part of persons associated with C. B. Strain and Son).

The scope of work attached to the fund "reservation" request divides the rehabilitation work into two classes: "Work to be Federally Financed," which includes installation of carpet, heat convectors, and bathroom, kitchen, and electrical fixtures; and "Work to be Done by Owner, C. B. Strain," which includes exterior repairs and some interior work such as painting and certain installations. There appear to be certain overlaps between the two groups. One work item, installation of heat convectors, appears in the scope of work for both federally-financed and owner-completed work. The cost estimate for the federally-financed work includes labor for items including heat convectors, while the cost estimate of work to be done by owner also includes an item for installation of heat convectors. We have been advised in a conversation with Connie Cargain of the Poughkeepsie Office of Property Development (the administering LPA) that these submissions were preliminary and were revised later.

The "reservation" for $900,000 was approved by HUD on May 20, 1977 (Central Office staff advises us that what this correspondence refers to as a "reservation" is in fact a mere letter of intent to fund).

The borrowers purchased the property on August 18, 1977. The borrowers executed the "Borrower's Certification" on their application for a § 312 loan on September 19, 1977, and on the same day, the LPA recommended HUD approval of the loan. On September 30, 1977, HUD informed the LPA that the application for the loan was approved (action taken September 27, 1977) and a fund reservation in the amount of $936,400 was made (action taken September 30, 1977). The HUD office stated in Section P (HUD Action on Application) of the completed form HUD-6243 application that the approval was "SUBJECT TO RESOLVING CERTAIN CONDITIONS BY LOAN SETTLEMENT" (emphasis in original). The conditions were not specified. The LPA wrote HUD on November 3, 1977 to ask what the conditions were, and was informed by letter of the same date that the conditions were submission of various credit reports and financial statements and "Certification that contractor has read and agreed to conform to provisions in HUD 6231.A [Supplemental Terms and Conditions for a § 312 loan, relating to labor standards], 3200 [Federal Labor Standards Provisions], and 3200.A [Amendment to Federal Labor Standards Provisions]." On December 29, 1977, the LPA sent HUD an undated certification by Richard C. Strain, President of C. B. Strain and Son, Inc., that "as the contractor," he read and understood the provisions of the HUD 6231.A, 3200, and 3200.A. (A similar certification on the part of the borrower is part of the § 312 loan application (HUD-6243, Box M) and was executed by the four partners on September 19, 1977.).

A February 6, 1978 letter to HUD indicated that as of December 22, 1977, there was a $100,000 capital contribution by the partner-owners used for capital additions and improvements to the project.

While the exact settlement date was not available from the files, it is presumed to be sometime after April 7, 1978, which was the date when the requisition for funds was paid by the Area Office. It is assumed, therefore, that rehabilitation of the Corlies Manor property was begun after HUD's letter of intent to fund the loan but prior to the loan settlement date.

In a phone conversation with Mrs. Cargain of the LPA, this office was advised that while Poughkeepsie was informally aware of the progress of the privately-financed rehabilitation as of the time of loan closing, no specific inspection of the privately-funded work was conducted at that time, so that the exact progress of the privately-funded portion is not established as of that date. Mrs. Cargain also advised that the LPA's specifications and conduct of the contracting process covered only the § 312-assisted portion of the work, for which C. B. Strain & Sons was general contractor. C. B. Strain apparently also acted as general contractor for the privately-funded work, but Mrs. Cargain was not aware whether that firm entered with a written contract with Corlies Associates for that portion. While the Poughkeepsie building department inspected the privately-funded work, the LPA inspected only the portion under the § 312-assisted contract. In other works, none of the privately-funded work, whether before or after the loan closing date, was under LPA specifications or was contracted for or inspected by the LPA. We understand that the HUD Area Office did inspect the completed project.

Mrs. Cargain indicated that she discussed the applicability of Davis-Bacon rates to the privately-funded portion of the work with two HUD officials in New York (since retired), and that it was concluded that the Davis-Bacon rates were not applicable to the privately-funded work.

II. Legal Discussion

a. Authority for Applicability of Davis Bacon

Rehabilitation loans under § 312 of the Housing Act of 1964 are made subject to Davis-Bacon prevailing wage rates through § 312(e), which gives the Secretary, in carrying out § 312, "the functions, powers, and duties set forth in Section 402 of the Housing Act of 1950 . . . ." Section 402(f) of the Housing Act of 1950 in turn provides in relevant part as follows:

> "The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on any project assisted under this title . . . shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (Davis-Bacon Act), as amended . . ." (emphasis added).

The section also makes provision for overtime, and for waiver of the section's requirements in certain circumstances when labor is volunteered.

b. Structure of the § 312 Program

With the exception of interim regulations published on April 4, 1979 to implement certain 1978 legislative changes and regulations published on May 10, 1979 with respect to energy conservation standards, there are no published regulations for the § 312 program. The program is governed in general by the Rehabilitation Financing Handbook (7375.1 REV) ("the Handbook"). It is to this handbook therefore, and to general program practices not inconsistent therewith, that we must look to determine during what time and to what extent work financed partially with § 312 funds and partially with private funds is a "project assisted" by § 312, to which Davis-Bacon wage rates apply.

The Handbook unfortunately does not generally spell out the applicability of various requirements on a chronological basis, and while there are references to requirements applying to work financed "in whole or in part" with a rehabilitation loan, the Handbook does not explicitly address the issue of privately-financed work undertaken prior to loan settlement.

Among the procedures required by the Handbook are the following:

1. The LPA must prepare a preliminary work write-up and cost estimate of the work to be done and, "when any of the work is to be financed with a rehabilitation grant and/or loan" (emphasis added), prepare a final work write-up and cost estimate as the basis for the grant or loan and for contracting. (Chapter 18, ¶ 1b and d.).

2. The work write-up is to be based on the assumption that § 312 financing will be used.

3. Chapter 19 sets out contracting requirements. However, it is unclear whether these requirements are meant to cover privately-funded contracts on a § 312 assisted project. Paragraph 1 states that the chapter applies to "construction contracts for rehabilitation financed through a rehabilitation grant, a rehabilitation loan, or both." This statement of coverage might be read to say that grant or loan financing (in whole or in part) of the overall rehabilitation, subjects all construction contracts for such work (even if some are privately financed) to the requirements of the Chapter. However, program staff have indicated that the Handbook was not intended to prevent the letting of separate privately funded contracts.

Paragraph 1 of Chapter 19 states that "construction work for rehabilitation financed through a rehabilitation grant and/or loan shall be undertaken only through a written contract between the contractor and the recipient . . . The Public Body shall assist each applicant in arranging for and obtaining an acceptable construction contract."

Chapter 19 also requires that the contract will be a single document to be signed by the contractor and accepted by the contractor "only following approval of the rehabilitation grant and/or loan" (¶ 1a). General conditions of the contract are prepared by the LPA. The contract is to be awarded only after the LPA has received a reservation of funds for the loan application (¶ 8b). Actual undertaking of the work is subject to the issuance of a proceed order (¶ 8a), which "shall be issued promptly after . . . loan settlement has been completed" (¶ 9, emphasis added).

4. Inspection requirements found in Chapter 20 apply to the "inspection of rehabilitation work financed in whole or in part with a rehabilitation grant and/or loan." The HUD Area Office must inspect completed construction work of a substantial dollar amount (¶ 1 and 2b).

5. Chapter 14 requires that at loan settlement the LPA deposit the § 312 loan check in a rehabilitation escrow account (¶ 3). Paragraph 4 states as follows:

> REHABILITATION GRANT AND/OR LOAN SUPPLEMENTED BY OTHER FUNDS. If a rehabilitation grant and/or loan is to be supplemented by funds to be provided by the applicant from a source other than through a commitment from a recognized lending institution, those supplemental funds shall be deposited in the rehabilitation escrow account at the same time the rehabilitation grant and/or loan check is deposited. Supplemental funds provided by means of a commitment from a recognized lending institution may either be deposited in the rehabilitation escrow account, or applied by the property owner for direct payment of the rehabilitation work. If the supplemental funds are to be deposited in the rehabilitation escrow account, the deposit must be made prior to any payment by the Public Body to the contractor. If the supplemental funds are not to be deposited in the rehabilitation escrow account, then such funds shall be applied in full by the property owner before any disbursements may be made from the rehabilitation escrow account for rehabilitation work.

The LPA draws checks from the escrow account for payment of "completed and approved" work and services (¶ 5c).

6. If non-federal financing is to be used, the § 312 application may be approved only when the LPA has evidence that the applicant has a supplemental loan commitment adequate to complete the required rehabilitation work. Where the applicant's funds come from other than a recognized lending institution. evidence that the funds will be available shall consist of LPA documentation and verification "that the applicant can deposit the required amount in the rehabilitation escrow account . . ." (Chapter 4, ¶ 2).

7. Chapter 10, ¶ 1 contains a chronological outline of the LPA's responsibilities in connection with residential and mixed use loans. Number 31 requires the LPA (on projects over a certain threshold) to "assure compliance with Federal Labor Standards provisions. This is a continuing responsibility until the work is completed."

8. Among the HUD Labor Standards forms, HUD-6231A adds to the § 312 terms and conditions a ¶ 13, which provides, *inter alia*, that the borrower shall include Davis Bacon wage

schedules and the HUD-3200 and -3200A in proposed contract documents for "a proposed contract for rehabilitation work which will be paid for in whole or in part with the proceeds of the Loan and which will entail the employment by the contractor or his subcontractors of laborers or mechanics . . ."

c. Davis-Bacon Applicability to Corlies Manor

S Since the applicability of Chapter 19 of the Handbook is unclear, it is unclear whether the § 312 Handbook permits the segregation of necessary rehabilitation work, as documented by the work write-up and cost estimate, into separate privately-financed and § 312-assisted contracts as was done on the Corlies Manor project.

Under the statute, however, Davis-Bacon coverage does not depend on the source of funding for a particular contract on a § 312 project. Section 402(f) of the Housing Act of 1950 requires the Secretary to take action to insure payment of Davis-Bacon rates on federally assisted projects. The language of the statute requires payment of Davis-Bacon rates where the overall project is federally assisted, even if a particular contract is privately funded and not federally assisted.

Where all rehabilitation is carried out under one unified contract, funded both by § 312 and by private sources, ¶ 13 of the § 312 loan provisions (found on form HUD-6231A) carries out the Davis-Bacon responsibility of the Secretary. Paragraph 13, which requires inclusion of wage determinations and labor standards, is applicable by its terms to a unified rehabilitatinn contract, since that contract would be "paid for in whole or in part with the proceeds of the Loan." However, where rehabilitation is permitted to go forward under two separate contracts, as in the present case, the HUD-6231A does not by its terms impose any obligation upon the borrower to incorporate the Federal labor standards provisions in a contract which was not paid for with the loan proceeds. Furthermore, § 402(f) of the Housing Act of 1950 is directed to the Secretary of HUD rather than to the borrower or contractor. We conclude therefore that neither the statute nor the supplemental § 312 terms and conditions prescribed by HUD impose a duty upon the borrower to require its contractor on a wholly privately financed contract to pay Davis-Bacon rates.

However, this does not dispose of the question whether workers on the privately-financed Corlies Associates contract should have been paid Davis-Bacon rates. While HUD's 6231A imposes Davis-Bacon rates on § 312-financed contracts, we have indicated that § 402(f) of the Housing Act of 1950 requires the Secretary to insure payment of such rates on federally-assisted projects. Thus the broader language of the statute requires payment of Davis-Bacon rates on a privately-funded contract where the overall project is federally assisted.

We next consider at what stage a § 312 project becomes federally assisted. It is our conclusion, based upon the § 312 program structure outlined above, that a particular § 312 program becomes "assisted" at the time that the loan application (HUD-6243) is approved by HUD (where HUD approval is required) and the fund reservation is made. While it is true that no § 312-assisted contract work can begin until a proceed order is issued following the loan settlement date, the fund reservation constitutes a "firm commitment" for the making of the loan (see Box R, HUD-6243). At the point of fund reservation, the applicant has indicated its intent to undertake rehabilitation in conformance with program standards and requirements, by submitting a formal application for assistance and outlining all proposed rehabilitation work, and HUD has given a clear indication that the loan will be forthcoming.

On the basis of the foregoing we conclude that § 402(f) requires HUD to take action necessary to insure payment of workers on a § 312 project at Davis-Bacon rates as of the date HUD notifies the LPA or applicant of loan approval and fund reservation. The fact that in the present case the loan approval was made subject to "certain conditions," met subsequently, did not postpone the commitment of the Department or the "assisted" character of the project. Therefore laborers and mechanics working on the Corlies Manor project should have received Davis-Bacon rates as of the date that the LPA received HUD's letter of September 30, 1977 enclosing the executed copies of the HUD-6243 approval.

d. Availability of Funds for Retroactive Payment of Davis-Bacon Rates

Workers on the privately-financed Corlies Manor contract should have been paid at Davis-Bacon rates back to the date of the LPA's receipt of the September 30, 1977 approval letter. As you have indicated, no payrolls covering such workers have been submitted, and the LPA states that it did not formally monitor or keep a copy of the privately-funded contract. A determination of the extent of any underpayment to affected workers must be based only upon submission of acceptable documentation to the Department.

However, assuming proper evidence of underpayments is received, the question remains whether there are funds available to reimburse the affected workers on the privately-funded contract who were paid below the prevailing Davis-Bacon rates. Since we have concluded that the borrowers violated no statutory requirement or loan condition by omitting Davis-Bacon provisions from the privately-funded contract, and the contractor was thus not bound to pay Davis-Bacon rates on that contract, neither the borrower nor the contractor would be obligated to pay the back wages in question.

The statutory duty to insure payment of Davis-Bacon rates falls upon the Secretary. Therefore it appears that this Department, or the LPA to the extent that the LPA has been delegated authority to administer the loan, is responsible for the failure to impose loan and contract conditions that would require payment of the Davis-Bacon rate to all rehabilitation workers on the assisted project. In this case it has been alleged that the LPA consulted with HUD personnel who were made aware of the existence of the separate privately-funded contract and agreed that Davis-Bacon rates were inapplicable to that contract. This allegation should be investigated. If the allegation is correct, it would be appropriate to place responsibility on HUD rather than on the LPA for nonpayment of Davis-Bacon rates under the private contract.

However, we know of no funding source within the Department which could readily be used to supply back wages for workers who should have been paid at the Davis-Bacon rates. Section 312(d) of the Housing Act of 1964 authorizes appropriations for a revolving fund which shall be available for "necessary expenses of servicing loans made pursuant to this section, including reimbursement or payment for services and facilities of the Government National Mortgage Association and of any public or private agency for the servicing of such loans." Recent appropriations for the Rehabilitation Loan

Fund, e.g., in FY 1978, have authorized loan commitments "not to exceed the total of loan repayments and other income available during [FY 1978], less operating costs," to be augmented by certain appropriated funds, We assume that "operating costs" refers to the "necessary expenses of servicing loans" mentioned in the authorizing statute and that neither would include back wage expenditures for rehabilitation workers.

It is possible that retroactive payment of rehabilitation workers could be made with funds under the Block Grant program, assuming that the particular rehabilitation project in question would have been an eligible activity from the beginning. This possibility could be explored further with Block Grant staff, but it is probable that the funds would come out of any Block Grant which is otherwise available to the locality, leaving the locality with less funding for its planned CDBG activities.

e. Recommendations Concerning § 312 Documents

We have indicated that the permissibility of the contract-splitting which occurred in the Corlies Manor case is unclear under the § 312 Handbook. If separate privately funded contracts are permissible after fund reservation, the present HUD-6231A, which requires Davis-Bacon obligations to be imposed only in contracts paid for with § 312 loan proceeds, does not carry out the Secretary's obligations with respect to all laborers and mechanics on an assisted project.

We understand that § 312 regulations are presently being drafted and § 312 documents are being reviewed. We would suggest that the permissibility of separate privately funded contracts be addressed and the LPA's oversight responsibilities with respect to such contracts be clarified. We also suggest that § 312 loan terms and conditions should clearly impose an obligation on the borrower to include Davis-Bacon requirements in all rehabilitation contracts for work which will be accomplished after fund reservation. and to follow Davis-Bacon requirements where the borrower undertakes work itself.

Marilyn G. Wagner

Deputy Associate General Counsel
for Finance and Administrative
Law

23 JUL 1979

Honorable James C. Cleveland
Member, United States
House of Representatives
316 Federal Building
55 Pleasant Street
Concord, New Hampshire 03301

Dear Mr. Cleveland:

This is in response to your letter of June 26, 1979 to the HUD Congressional liaison office, enclosing correspondence from George J. Moylan, Executive Director of the Keene Housing Authority, concerning the applicability of Davis-Bacon wage rates to traditional public housing and Section 8 housing programs. Mr. Moylan's questions are discussed below:

1. Mr. Moyland notes that under the new Section 8 Moderate Rehabilitation program, Davis-Bacon wage rates are not applicable where an owner has fewer than nine units under an Agreement [between a Public Housing Agency (PHA) and the owner] to Enter into Housing Assistance Payments Contract, even where the overall Annual Contributions Contract between HUD and the PHA covers more than nine units; on the other hand, under the traditional public housing program where the PHA itself is undertaking substantial rehabilitation, the Davis-Bacon rates apply even where only one or two units are being rehabilitated.

Discussion: The difference in the application of Davis-Bacon to the Section 8 program and the traditional public housing program is prescribed by statute. Section 12 of the U. S. Housing Act of 1937, as amended, requires that Davis-Bacon rates be paid to

> "all laborers and mechanics employed in the development of the project involved (including a project with nine or more units assisted under section 8 of this Act, where the public housing agency or the Secretary and the builder or sponsor enter into

an agreement for such use before construction or rehabilitation is commenced) . . ."

The statute thus provides a specific exemption, added at the same time that the Section 8 program was enacted, for Section 8 projects of fewer than nine units from Davis-Bacon requirements. The statute provides no comparable exemption for traditional public housing development.

While the HUD Section 8 Moderate Rehabilitation regulations generally define all units included in a single Annual Contributions Contract as one project (24 CFR § 882.403(a)), the regulations specifically provide for compliance with Davis-Bacon and other labor standards provisions "for Agreements covering nine or more assisted units" (§ 882.408(c)(6)). Thus, the regulations in effect indicate that each Agreement with an owner rather than each Annual Contributions Contract constitutes a "project" for purposes of applying the nine-unit Davis-Bacon threshold.

Contrary to the impression given in the June 7, 1979 letter from our Manchester Area Office enclosed by Mr. Moylan, Davis-Bacon rates and the Contract Work Hours and Safety Standards Act apply to a traditional public housing project such as NH 10-5 regardless of the number of units being rehabilitated.

2. Mr. Moylan notes that Section 115 of Part II of the Annual Contributions Contract with HUD covering the traditional public housing units applies the Davis-Bacon provisions to "each contract entered into by the Local Authority in connection with the development of the project . . . (other than contracts for less than $2000 . . .) . . ." He indicates that where an entire project involves $2000 or more, HUD has interpreted this clause to apply to all work, even though an individual contractor may be doing work of under $2000.

Discussion: The application of Davis-Bacon rates to a particular contractor doing less than $2000 of work, on a project where a total of more than $2000 of work is being done, depends upon whether the contractor is contracting directly with the PHA or is a subcontractor. Where a firm contracts directly with the PHA for less than $2000 of work, Davis-Bacon rates will not apply, pursuant to the exclusion in § 115 of the Annual Contributions Contract. However, where there is a prime contract of over $2000, a firm which is a subcontractor on that prime contract is covered by Davis-Bacon rates regardless of subcontract amount.

Mr. Moylan's reference to a "Main Construction Contract" of over $2000 is somewhat confusing. The term "Main Construction Contract" as defined in § 107(a) of the Annual Contributions Contract is not synonymous with "general contractor" since there may be more than one Main Construction Contract, each covering portions of the "Main Construction Work." Where more than $2000 of work is done on a particular project, it does not necessarily follow that there is a "Main Construction Contract" exceeding $2000 as he states, since the work may be done in part by housing authority employees, or may be handled by several firms which contract directly with the PHA.

Mr. Moylan's peference to a program involving "many small contracts using a force account type of procedure with the Housing Authority acting as the general contractor" is also somewhat confusing in its use of the term "force account." ("Force account" was used similarly in the letter from our Manchester office which Mr. Moylan enclosed). The term "force account" is generally used to distinguish the use of workers who are direct employees of the PHA and are part of its own staff (force account workers), from accomplishment of the work by bona fide outside contractors which are not employees of the PHA. It would of course be impermissible to treat force account employees of a PHA, who must be paid Davis-Bacon rates in all cases when they perform development work, as "contractors" for Davis-Bacon purposes. However, there is no objection to the PHA's contracting with a number of bona fide small contractors to accomplish the work.

We hope this information is helpful in clarifying the applicability of Davis-Bacon requirements to the low-rent housing programs.

Sincerely,

(signed) Irving P. Margulies
Irving P. Margulies
Acting Deputy General Counsel

14 AUG 1979

MEMORANDUM TO: Robert C. Embry, Assistant Secretary for
Community Planning and
Development

SUBJECT : Applicability of Davis-Bacon Wage Requirements to
CDBG-Funded New Construction of Seven or Fewer
Residential Units

By memorandum of June 25, 1979 addressed to you and Edward Norton, the Area Manager of the Pittsburgh Area Office asked that we reexamine the applicability of Davis-Bacon wage requirements to residential new construction under Title I of the Housing and Community Development Act of 1974. He enclosed a request from a consultant for the Turtle Creek Valley Housing Development Corporation (Turtle Creek) for an opinion as to the applicability of the Davis-Bacon provisions of § 110 of the Act to CDBG-funded residential new construction of seven or fewer units. He also enclosed an opinion from a member of the Area Counsel's staff that took issue with an earlier opinion of this office (February 23, 1979, from the Acting Associate General Counsel for Finance and Administrative Law) that UDAG-funded residential construction of seven or fewer units is not subject to Davis-Bacon requirements.

I reaffirm this office's earlier opinion of February 23, 1979, and in consonance with that opinion conclude, in response to the inquiry of Turtle Creek, that CDBG-funded (as well as UDAG-funded) residential new construction of seven or fewer units is not covered by Davis-Bacon requirements under the provisions of § 110 of the HCD Act.

I have reviewed the opinion of the Area Counsel's staff attorney and disagree with its conclusion — that HUD is barred by what he asserts is the "plain meaning" of the statute from considering its legislative history. There is authority for the position that where the statutory language appears clear and plain on its face, there is no occasion to look to the legislative history to interpret the language or ascertain legislative intent. However, the Supreme Court has rejected the theory that it is improper to refer to legislative history in such circumstances. The U. S. Court of Appeals for the Third Circuit stated the matter as follows in United States v. Duncan (527 F.2d 1278, 1280 (3rd Cir. 1975)):

The Supreme Court, in Cass v. United States, 417 U. S. 72, 78-79, 94 S. Ct. 2167, 2171, 40 L. Ed. 2d 668 (1974), rejected the notion that it is improper to refer to legislative history when a statute can be said to be clear on its face:

> . . . The Court has previously stated "[w]hen an aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, Inc., 310 U. S. 534, 543-544 [60 S. Ct. 1059, 1064, 84 L. Ed. 1345] (1940); Harrison v. Northern Trust Co., 317 U. S. 476, 479 [63 S. Ct. 361, 362, 87 L. Ed. 407] (1943). Such aid is available in this case and we decline to ignore the clearly relevant [legislative] history . . .

The Supreme Court has recently noted the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." United Steelworkers of America, AFL-CIO-CLC v. Weber, 47 U.S.L.W. 4851, 4853 (U. S. June 27, 1979), quoting from Holy Trinity Church v. United States, 143 U. S. 457, 459 (1892).

Accordingly, it was appropriate for this office to review the legislative history of § 110 in the February 23, 1979 opinion. The legislative history cited in that opinion supports the conclusion stated therein — that Congress intended a general exemption from Davis-Bacon requirements for all Title I assisted construction of seven or fewer residential units.

In addition, as the February 23 opinion noted, Congress has long specified a threshold number of units below which Davis-Bacon rates did not apply to construction under various housing programs involving private owners. See § 212 of the National Housing Act (thresholds of from eight to twelve families under various programs of insurance).

Finally, we note that in establishing a program of assistance to State housing and finance agencies which clearly did contemplate new residential construction, Congress in § 802(g) of the Housing and Community Development Act of 1974 provided "[t]hat this section shall apply to the construction of residential property only if such property is designed for residential use for eight or more families." This language, in conjunction with the conference committee's explanation (cited in the February 23 opinion) for use of the term "rehabilitation" instead of "construction" in § 110 of the same Act, reinforces the conclusion that Congress intended the eight-family threshold to apply to all residential construction under Title I.

Irving P Margulies

Irving P. Margulies
Acting Deputy General Counsel

OCT 11 1979

Thomas Sherman, Acting Director, Office of
Indian Housing

Irving P. Margulies, Office of General Counsel

Wage Rates Applicable to Fire Damage Restoration on Indian Housing

This responds to your office's September 5 request for our assistance in replying to a memorandum of August 2, 1979 on the above subject from Keith Axtell, Director, Office of Indian Programs, Region IX. The issue raised by Mr. Axtell is whether Davis-Bacon wage rates must be paid by contractors engaged by Indian Housing Authorities (IHAs) to restore fire-damaged Mutual Help and Low Rent units.

Mr. Axtell states the circumstances as follows:

> . . . The work, which is paid for by the insurance company, often involves complete restoration of the home at a cost which at times approaches $50,000. Part of the problem is that the insurance company bases the payment to the IHA on an estimate from a contractor brought in by its adjuster. The contractor usually indicates his willingness to do the work for the estimated amount but is not willing to obligate himself to pay Davis-Bacon wages. Attempts by an IHA to obtain bids from others based on Davis-Bacon requirements result in substantially higher costs which the insurance company is unwilling to assume.

We understand that the insurance company's estimate and payment is often completed before a Davis-Bacon wage determination could be obtained. It is also our understanding that Mr. Axtell's concern is with units which have already been completely constructed and have been occupied at the time of the casualty loss.

Legal Analysis

A. The Statute

On November 18, 1977, the General Counsel advised Assistant Secretary Simons concerning the applicability of Davis-Bacon wage rates under the

Modernization program. That memorandum discussed several of the legal determinants of Davis-Bacon applicability, some of which we restate here:

1. The prevailing wage requirements under the public housing program, including Indian Housing, are contained in Section 12 of the United States Housing Act of 1937 (as amended by the Housing and Community Development Act of 1974) ("USHA"). Section 12 requires that Davis-Bacon wage rates be paid to "all laborers and mechanics employed in the development of the project," while HUD-determined ("maintenance") prevailing wage rates must be paid to "all maintenance laborers and mechanics employed in the operation" of the project.

2. The terms "development" and "operation" are defined in §§ 3(3) and 3(4) of the USHA. However, there is in fact a range of activities which could fall within both categories. Development and operation were defined broadly in the USHA, thus giving HUD flexibility in administratively defining these terms.

3. The General Counsel recommended that "major repairs" under the Modernization program, which traditionally were not considered development activities, should not be considered development for Davis-Bacon purposes merely because of their recent eligibility for Modernization (development) funds. Similarly, in a subsequent memorandum of March 2, 1978 to Assistant Secretary Simons, the General Counsel indicated that "replacements" by items of substantially the same kind should be considered operational, while "replacements" of substantially upgraded items should be considered as development, for Davis-Bacon purposes.

Using a similar approach to the question of reconstructing occupied units damaged or destroyed by fire or similar cause, we conclude that such reconstruction after casualty losses should not be considered a "development" activity which would, under Section 12 of the USHA, require the payment of Davis-Bacpn wage rates to laborers and mechanics employed in the reconstruction. However, such workers must be paid the HUD-determined prevailing rate ("maintenance" rate).

Reconstruction of occupied units with casualty loss insurance proceeds is analogous to major repair work and replacements by items of substantially the same kind. Major repairs "may include the replacement of structural elements due to normal wear and tear by items of substantially the same kind."(24 CFR § 868.2). Reconstruction after fire would involve similar replacements made necessary by casualty loss rather than wear and tear. Reconstruction after fire is merely intended to restore the status quo of a habitable unit, and the amount of insurance proceeds provided by the insurer to carry out the work is based upon this limited goal. While reconstruction may be a more comprehensive, hopefully nonrecurring form of work than day-to-day maintenance, both are part of the IHA's duty of operating and maintaining the units. This is clearly indicated by the placement of provisions relating to "Reconstruction and Restoration" in Section 210 of Article II ("Operation"), rather than in Article I

("Develppment"), of the Low Rent ACC and the pre-1976 Mutual Help ACC (the reorganized March 1976 Mutual Help ACC places these provisions in Section 9.2 of a separate Article IX ("Insurance")).

B. The ACC

While we have concluded that the statute does not require the payment of Davis-Bacon rates for reconstruction work, the question has also been raised whether the provisions of the pre-1976 Mutual Help ACC and the current Low Rent ACC impose Davis-Bacon rates on major reconstruction as a contractual matter. We conclude that they do not.

Section 210 of the pre-1976 Mutual Help ACC contains the following provision:

> (C) Whenever any such reconstruction, restoration, or repair can be accomplished substantially as one operation, and is not to be performed by the normal staff of the Local Authority, and the estimated cost thereof is in excess of $10,000, the Local Authority shall accomplish such reconstruction, restoration, or repair in compliance with the provisions (appropriately modified) of the following sections and subsections: 106 (B) (C), 107, 108, 109, 110 (D) (E), 111, 112, 113, 114, 115, 116, 211 (A), 302, 303, and 305.

Subsections 110(D) and (E), made applicable by this provision, are part of the ACC section dealing with prevailing salaries or wages during development. In that section, subsection 110(A) requires HUD-determined "technical" wage rates to be paid to architects, technical engineers, etc., employed in development, while subsections 110(B) and (C) impose provisions for the payment of Davis-Bacon wages to laborers and mechanics employed in the development of the project. Subsection (D) requires the local authority to withhold payment until it receives an affidavit from the contractor of "payment to each class of employees in compliance with the applicable provisions of subsections (A), (B), and (C) of this Sec. 110." Subsection (E) prohibits consideration of claims for "additional compensation," on any contract identified in subsections (A) and (B), that are attributable to the payment of wages exceeding the prevailing wage rates specified in the contract.

It might appear at this point that while Section 210 does not specifically make subsections 110 (A), (B), and (C) applicable to major reconstruction, nevertheless the technical and Davis-Bacon wages required by (A), (B), and (C) become applicable through subsections 110 (D) and (E), which are specifically made applicable to major reconstruction. However, among the string of sections that Section 210 applies to major reconstruction is also subsection 221(A), which specifically requires payment of not less than HUD-determined maintenance wage rates. Thus, Section 210 specifically includes the maintenance wage provision, while excluding the Davis-Bacon provisions (Section 110(A), (B), and (C)).

Construing the provisions of subsections 110(D) and (E) together with subsection 211(A), and noting that Section 210 makes these provisions applicable as "appropriately modified," we conclude that Section 210 does not require payment of Davis-Bacon rates on major reconstruction. Rather, Section 210 specifically requires payment of maintenance wage rates. In addition (appropriately modifying subsections 110(D) and (E)), Section 210 requires a contractor's affidavit that maintenance wage rates have been paid, and that the Local Authority may not consider claims for "additional compensation" that are attributable to payment of wages above the maineenance wage rates which must be specified in the contract.

We conclude that the pre-1976 Mutual Help ACC does not contractually require Davis-Bacon rates on reconstruction under Section 210. Our conclusion applies also to the Low Rent ACC which contains analogous provisions. The current Mutual Help ACC does not contain the cross-references that appeared in the earlier ACC and clearly does not require Davis-Bacon wages on such reconstruction.

Associate General Counsel
Finance and Administrative Law

DEC 5 1979

Elizabeth R. Raymond, Assistant to the
Secretary for Labor Relations

Marilyn G. Wagner, Office of General Counsel

Davis-Bacon Applicability to Rehabilitation of Selected Units
in Multifamily Structures Under § 312 and Block Grant Programs

This is in response to your memorandum of November 6, 1979, in which you asked whether Davis-Bacon wage rates would apply to a residential building (within the Columbus Area Office's jurisdiction) undergoing rehabilitation assisted under § 312 of the Housing Act of 1964, where the total number of units in the building exceeds the Davis-Bacon threshold of eight units but fewer than the threshold number of units are being rehabilitated with § 312 funds. Subsequently your staff asked us also to address the same question, raised orally by House Appropriations Committee staff, with respect to a residential building rehabilitated with Block Grant funds under Title I of the Housing and Community Development Act (HCD Act) of 1974. We conclude that under either program, Davis-Bacon rates would apply in the situation you have posed. Because the basis for this conclusion is different for each program, we discuss the two programs separately below.

A. Section 312

Your memorandum made clear that the issue you raised under the § 312 program concerned a building in which "the other units were rehabilitated with private funds prior to the 312 loan process" (emphasis added). Therefore the rehabilitation work on such other units is not part of the project assisted by § 312 and is not subject to Davis-Bacon rates. The issue then is whether the applicability of Davis-Bacon rates to rehabilitation of § 312-assisted units is determined by the number of the § 312-assisted units or by the total number of units in the building.

As we have discussed in earlier memoranda, no Davis-Bacon unit threshold for § 312 projects is specified in the relevant Davis-Bacon related Acts (§ 402(f) of the Housing Act of 1950, relating to the

College Housing Program, and later made applicable to the § 312 program by § 312(e) of the Housing Act of 1964). Therefore, the Davis-Bacon unit threshold for § 312 was established administratively, consistent with Congressional intent that rehabilitation of small scale residential projects not be covered by Davis-Bacon. This intent was evidenced in particular by the 12-unit statutory threshold for rehabilitation projects assisted under § 220 of the National Housing Act, and later by the eight-unit statutory threshold established for Title I (including Block Grant) residential rehabilitation under § 110 of the HCD Act of 1974.

Since the § 312 Davis-Bacon threshold is established administratively, we look to the language of the HUD issuance establishing the threshold to determine the exact reach. Chapter 13, Section 6 L of the Rehabilitation Financing Handbook (7375.1 REV), as that paragraph was revised in September 1977, provides in relevant part that the applicant shall agree to the following:

> Federal Labor Standards Provisions. Abide by the Federal Labor Standards provision, if the rehabilitation loan is:
>
> (1) For a residential property (or combination of residential properties) or a mixed-used property (or combination of mixed-used properties) that will:
>
> (a) Contain a total of 8 or more dwelling units after rehabilitation, and processing of the loan by the LPA was begun on or after February 1, 1977.
>
> (b) Contain a total of 12 or more dwelling units after rehabilitation, and processing of the loan by the LPA was begun prior to February 1, 1977.

* * *

It is clear from this language that the applicability of the labor standards provisions, including Davis-Bacon rates, is dependent only on the total number of dwelling units that will be contained in the entire property covered by the loan, after rehabilitation is completed. The number of units currently being rehabilitated is not made a factor. Another paragraph in the Handbook (Chapter 10, paragraph 1a (31)), which indicates the public body's responsibilities with respect to labor standards, uses similar language (but apparently was inadvertantly not amended to reflect the newer eight unit threshold). We conclude that under the present § 312 Handbook provision, rehabilitation of a property that is covered by a § 312 loan is subject to

Davis-Bacon wage rates if it will contain a total number of units above the threshold amount after rehabilitation, regardless of the number of units being rehabilitated.

B. Block Grants

Section 110 of the HCD Act of 1974, as amended, provides in relevant part as follows:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with grants received under this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5): Provided, That this section shall apply to the rehabilitation of residential property only if such property is designed for residential use for eight or more families. . . .

On the question of whether the eight-family threshold applies to the entire property or just the units (property) currently being rehabilitated, the statutory language is far from clear.*

Language in the Congressional reports concerning this provision sheds little light on this issue. The Conference Report (HR Rep. No. 93-1279, 93d Cong., 2d Sess. (1974)) contains the following statement:

> The Senate bill applied the prevailing wage requirements of the Davis-Bacon Act to residential construction involving 12 or more units and to rehabilitation involving 8 or more units. The House amendment applied such requirements only to the construction of 8 or more units without

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*As a practical matter, we note that the issue here concerns Davis-Bacon application in a relatively narrow set of circumstances—i.e., only when the Title I assisted rehabilitation in a building is confined to the fewer-than-eight dwelling units themselves. Whenever the rehabilitation extends from these units into any common areas such as roof, hallways, or boiler, the rehabilitation would be covered by Davis-Bacon rates under either conclusion. In addition, the private recipient may not avoid Davis-Bacon coverage by claiming to allocate to specific units a general Block-Grant-funded loan or grant for, e.g., 25 percent of the cost of rehabilitating a 20-unit apartment house.

> reference to rehabilitation. The conference report contains the House provision with a technical amendment making it clear that the requirement applies only to rehabilitation, since construction of residential structures is not a permissible use of community development funds.

It might be argued that the reference to "rehabilitation involving 8 or more units," in describing the Senate bill, evidenced an intent to restrict Davis-Bacon coverage to instances where the threshold number of units was actually undergoing rehabilitation. However, it may also be argued that such an interpretation of this general descriptive language is unnecessarily restrictive, and that the Conference Committee meant no more than to refer to rehabilitation involving a structure with eight or more units. Because of other evidence of Congressional intent discussed below, we conclude that the latter position is correct, and that § 110 applies Davis-Bacon rates on the basis of the total number of units in a structure.

On construing an ambiguous § 110, we look to other Congressional enactments concerning Davis-Bacon for an indication of Congressional intent in connection with similar housing programs. In particular, Section 220 of the National Housing Act provides, among other things, for mortgage insurance for residential rehabilitation. Section 212 of the National Housing Act, which applied Davis-Bacon to various National Housing Act sections, indicates as follows with respect to Section 220:

> The provisions of this section shall also apply totthe insurance of any loan or mortgage under Section 220 . . . which covers property on which there is located a dwelling or dwellings designed principally for use for twelve or more families.

Thus, with Section 220 (originally enacted as part of the Housing Act of 1954), Congress clearly based its Davis-Bacon threshold on the total number of dwelling units on the property; although fewer than the total number might be rehabilitated under Section 220, rehabilitation of those units would be covered by Davis-Bacon so long as the total number of units on the property exceeded the threshold.

In view of this clear precedent and the lack of any clear textual basis for a contrary conclusion in the language of § 110, we conclude that § 110 of the HCD Act applies Davis-Bacon rates to Title I assisted rehabilitation of residential units where the entire building contains eight or more units, regardless of whether eight or more units are being rehabilitated.

Marilyn G. Wagner

Deputy Associate General Counsel
Finance and Administrative Law

DEC 27 1979

Elizabeth Raymond, Assistant to the Secretary
for Labor Relations

Marilyn G. Wagner, Office of General Counsel

Applicability of Davis-Bacon Wage Rates to Plant Renovations in Connection with UDAG-funded Loans (Anchor Hocking Corp., Clarksburg, West Virginia)

This is in response to your memorandum of October 30, 1979, requesting our opinion on the above matter. You forwarded a memorandum from Paul Gilboy of the HUD Pittsburgh Area Office, who enclosed an October 11, 1979 letter in which the matter was raised by Gordon T. Butler, an attorney with Anchor Hocking Corporation (Anchor). The issue is whether Davis-Bacon wage rates apply to renovations and improvements to a plant facility purchased by Anchor as part of its commitment toward the award of an Urban Development Action Grant, where such renovations and improvements are financed in part by a loan to Anchor from UDAG funds, and where (1) Anchor intends in its books to allocate the UDAG-financed loan proceeds to specific items, generally consisting of plant equipment purchases rather than renovation work; and (2) some of the funds are used to reimburse Anchor for plant improvements it made between preliminary grant approval and the later execution of the loan.

I. Background

On July 2, 1979 HUD executed a $4 million UDAG grant to the City of Clarksburg, West Virginia to fund the following activity:

> [t]he loan of $4,000,000 by Recipient [Clarksburg] to AID [the Association for Industrial Development of Harrison County, West Virginia] to provide part of the funds for a $8,500,000 loan by AID to [Anchor] for [Anchor's] acquisition, remodeling and re-equipping of the vacant former Brockway glass manufacturing facility located . . . in Clarksburg . . . ; the total cost of said acquisition,

> remodeling and re-equipping shall be not less than $19,500,000 . . . . [Exhibit B to the UDAG Grant Agreement, as amended July 24, 1979 to include plant acquisition and to increase the total cost figure].

According to Anchor's attorney, HUD originally approved the $4 million UDAG grant on May 3, 1979, and the grant funds were "received by the City on September 21, 1979 and immediately loaned to [AID] which in turn loaned the funds to Anchor."*

In the meantime, "[o]n or after May 3, 1979 Anchor made expenditures in connection with the above described purchase and renovation and such expenditures were made in reliance on HUD's approval and with the expectation that the $4.0 million grant funds to be received by Anchor would be applied toward expenditures of a type which are outside the scope of the Davis Bacon Act." These expenditures included the expenditure on May 3, 1979 of $6.25 million to purchase the plant. Also in the meantime, Anchor borrowed $4.5 million (the non-UDAG portion of the $8.5 million referred to in the grant) from AID on August 31, 1979 toward reimbursement of the $6.25 million purchase price. Anchor's attorney states the position that the UDAG funds should be used (1) for reimbursement of the $1.75 million remainder of the purchase price and (2) to reimburse Anchor for its past and future expenses in connection with ten specific capital assets. Anchor's attorney indicates that:

> . . . all of [these] capital assets will be carried on Anchor's books as personal property although some of the expenditures involve payments for labor. With regard to the funds expended for these capital assets prior to September 21, 1979, Anchor will consider the Grant proceeds as replacing the general corporate funds expended therefor. With regard to funds to be expended after September [21], 1979, a separate ledger account will be implemented for the purpose of allocation of the loan proceeds to those items listed in Exhibit A until such time as the balance ($2.25 million) of the Grant funds have been allocated. Although the Grant funds have been commingled with Anchor's general corporate funds, the bookkeeping entries represent the only reasonable and practical way of allocating the Grant funds as desired and anticipated by the parties.

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*We understand from Anchor's attorney that Anchor was orally notified of preliminary approval on May 3, 1979. However, a notation on the cover sheet of the UDAG Grant lists May 7, 1979 as the date of preliminary approval.

II. Discussion

a. UDAG Davis-Bacon Coverage

UDAG activities are assisted pursuant to § 119 of the Housing and Community Development Act of 1974 [HCD Act of 1974], as amended by the Housing and Community Development Act of 1977. Davis-Bacon wage rates are made applicable to UDAG activities by § 110 of the HCD Act of 1974, as amended, which provides in relevant part as follows:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with grants received under this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5) . . . The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934, as amended (48 Stat. 948; 40 U.S.C. 276 (c)).

Because this section applies Davis-Bacon rates only to employees of "contractors and subcontractors," Davis-Bacon rates are generally inapplicable to "force account" work performed directly by state and local government grantees with their own work force. Since we have been informed orally by Anchor's attorney that Anchor is performing plant renovations in part with its own employees, the question arises whether Anchor is a contractor, within the meaning of § 110, whose own work force is subject to Davis-Bacon rates in the performance of UDAG-assisted renovations.

First, we note that the contractor-subcontractor limitation in § 110 was apparently included by Congress, as is similar Davis-Bacon language in other Federal assistance statutes (e.g., § 109 of the Local Public Works Capital Development and Investment Act of 1976; § 402(f) of the Housing Act of 1950, as added by the Housing Act of 1959 (College Housing Program)), primarily to avoid causing the establishment of dual pay scales within the civil service of state and local governments that are the primary or exclusive grantees or recipients under such programs. Second, in the present case Anchor, as beneficiary of the loan, has in any event contracted with Clarksburg and AID to expend the UDAG-funded loan proceeds as well as additional funds for specified purposes including the plant renovations (Paragraph D1, Loan Agreement among Anchor, Clarksburg, and AID); Anchor has also acknowledged that the UDAG grant award was based in material part upon Anchor's assurance that Anchor would begin work on such purposes by a certain date and complete the expenditure of $19.5 million by another date (Id. at Paragraph 9). Under these circumstances, we conclude that Anchor is a contractor and that in the performance of the renovations, its own work force is subject to Davis-Bacon rates to the same extent as the employees of the independent contractors it hires to perform the work.

b. Beneficiary's allocation of UDAG Assistance to Equipment Purchases

We turn next to the question whether Anchor may, by allocating the UDAG-funded loan proceeds in its books to ten specific capital equipment items, avoid the application of Davis-Bacon rates to the remainder of the plant renovations being undertaken. We conclude that it cannot.

Section 110 of the HCD Act applies Davis-Bacon rates to "construction work financed in whole or in part with grants received under this title . . ." It is clear from our earlier quotation from Exhibit B of Clarksburg's UDAG Grant Agreement (see "Background," above) that UDAG moneys were provided to fund the $4 million loan from Clarksburg to AID in order "to provide part of the funds for a $8,500,000 loan by AID" to Anchor for "acquisition, remodeling, and re-equipping" of the plant. Thus the UDAG funds clearly were made available under the terms of the Grant Agreement to finance "in part" the entire scope of plant renovation work and purchases which Anchor would be obligated to undertake. The Grant Agreement contemplated no separation of the activities into privately-financed and UDAG-financed portions.

To conclude, despite the broad terms of the Grant Agreemnt, that Davis-Bacon is inapplicable if Anchor follows the bookkeeping steps it has proposed, would be to permit Davis-Bacon coverage and enforcement to be conditional upon a unilateral, after-the-fact allocation on the beneficiary's internal books, in preference to reliance on the Grant Agreement and other UDAG documents. Moreover, such a conclusion would in effect nullify the reference in § 110 to construction work financed "in part" under Title I, since the beneficiary would be free to narrow the scope of Davis-Bacon coverage on a Title I financed project to a few selected activities it considered financed "in whole." These results would frustrate Federal enforcement of Davis-Bacon and other program requirements and run counter to the plain provisions of § 110.

Accordingly, in view of the broad terms of the Grant Agreement, we conclude that a unilateral action by Anchor, as the beneficiary of the

UDAG-funded loan, to allocate the loan proceeds on its books to specific purchase items, does not operate to narrow the scope of Davis-Bacon covered activities.

c. Renovation Performed After Preliminary Grant Approval

The question also arises whether Davis-Bacon covers renovation activities that Anchor completed between the date of HUD's preliminary approval of the UDAG grant and the execution of the UDAG-funded loan to Anchor.

This question involves a determination of the point at which Anchor's plant renovation activities became "financed . . . with grants received under this title . . ." and thus subject to Davis-Bacon rates pursuant to § 110. As you know, we have previously determined that the use of private construction financing for construction work does not exclude construction from Davis-Bacon coverage when UDAG permanent financing in whole or in part is contemplated at the time construction financing is arranged. This principle applies in the present case. Here, the undertaking of the renovation work, and the financing of the work by the renovator itself or a lending source, was dependent on the eventual availability of UDAG funds to provide partial financing for the work. Once Clarksburg had submitted a UDAG applicaton to HUD and Anchor was informed of preliminary HUD approval, Anchor's expenditures for renovation work were made, as admitted in the letter of October 11, 1979 from Anchor's attorney, "in reliance on HUD's approval." We understand also that under the terms of the Grant, Anchor's expenditures for such renovations are eligible for reimbursement with the proceeds of the UDAG-funded loan. We conclude that such renovations were UDAG-financed and hence, pursuant to § 110, are subject to Davis-Bacon rates from the date of preliminary HUD approval of the UDAG grant.

III. Summary

We have concluded that, under the facts presented, plant renovation work performed by Anchor or its contractors is subject to Davis-Bacon wage rates. In particular, we have concluded that (1) in view of the broad terms of the UDAG grant agreement, any allocation of the loan proceeds on Anchor's books to specific purchases of capital items will not narrow or eliminate Davis-Bacon coverage of the renovations financed under the terms of the Grant; and (2) Anchor's plant renovations, the expenditures for which are eligible for reimbursement with UDAG-funded loan proceeds, are subject to Davis-Bacon rates from the date of HUD preliminary approval of the Grant.

Marilyn G. Wagner
Deputy Associate General Counsel
Finance and Administrative Law

2 7 AUG 1979

Mr. Larry E. Meierotto
Assistant Secretary
Department of the Interior
Washington, D. C. 20240

Dear Mr. Meierotto:

This is in response to your letter of July 2, 1979 to Mr. Robert Embry, Assistant Secretary for Community Planning and Development, concerning the final environmental impact statements (EIS) for the Westglen, Westbourne and Sundown Subdivisions in Harris County, Texas. You advised that you considered the EIS's inadequate because HUD failed to carry out any archeological survey of the project areas in order to identify historic or cultural resources which may be eligible for the National Register of Historic Places. It is your contention that such surveys are the responsibility of HUD under the Archeological and Historic Preservation Act of 1974 (P.L. 93-291), the National Historic Preservation Act (NHPA), as implemented by 36 CFR 800 (revised in 44 F.R. 6068, January 30, 1979), and the National Environmental Policy Act (NEPA). You stated, therefore, that such surveys should be a requirement for HUD approval of these subdivisions and a mandatory requirement for HUD approval of other projects of similar nature and potential impact.

We disagree with the position expressed in your letter. The Archeological and Historic Preservation Act was not designed to substitute for NEPA and the NHPA or to impose a survey requirement that goes beyond an agency's initial responsibility under NEPA and NHPA of establishing and evaluating environmental impacts.

There is nothing in the Archeological and Historic Preservation Act which requires routine "up-front" archeological field survey as part of the NEPA and NHPA evaluation process of archeological or cultural resources.

Under 36 CFR 800.9 agencies are to coordinate NEPA compliance with the separate responsibilities of the NHPA to ensure that historic and cultural resources are given proper consideration in the preparation of EIS's, and agencies must comply with obligations established pursuant to the NHPA even when an EIS under NEPA is not required.

With respect to the responsibility for identifying historic and cultural resources under the NHPA, HUD follows the provisions of 36 CFR 800.4 -- the procedures of the Advisory Council on Historic Preservation -- as to verifying the presence and effects on known or identified archeological resources in the environment of a HUD project or undertaking. Pursuant to these provisions, HUD consults the published lists of the National Register of Historic Places for actual listings and the State Historic Preservation Officer (SHPO) and other public records to determine the historic properties known to be in the area of the federal undertaking (§ 800.4(a)(1)), and consults with the appropriate SHPO to apply the National Register criteria in 36 CFR 60.6 to identify those properties which may be eligible for inclusion in the National Register (§ 800.4(a)(3)). In determining such eligibility the Secretary of the Interior is consulted for his opinion pursuant to Section 800.4(a)(3) where HUD determines that a property appears to meet the Criteria or if it is questionable whether the Criteria are met.

This is our normal review process for identifying historic and cultural resources under the Advisory Council procedures, and we can find no basis under the NHPA or the Advisory Council's procedures for the Department of Interior or the SHPO's to require that HUD conduct futher field surveys or excavations to prove the absence of historic or archeological properties. If evidence of something of historic or cultural value turns up during the review process, federal agencies under § 800.4(a)(2) have the discretion to consider taking further action to identify eligible properties, which may include a professional cultural resource survey. In the absence of any such evidence, surveys of a proposed project site neet not be considered. In our opinion the Department of Interior is confusing the identification of resources with proving the non-existence of archeological resources, which clearly is not required by any statute or the Advisory Council's procedures.

HUD's responsibilities under the Archeological and Historic Preservation Act are limited to those cases in which, the Advisory Council procedures having been followed, HUD proposes to proceed with a project and the Archeological and Historic Preservation Act must be invoked to complete survey, retrieval and preservation steps if there appears to be potential loss or destruction on the project site of significant historic or archeological properties.

The EIS's in question involve an analysis of subdivision plans for purposes of FHA insurance. The only provisions of the Archeological and Historic Preservation Act which could apply to HUD's insurance programs would be Section 3(b) and Section 4. In asserting that the responsibility to conduct a survey belongs to HUD, you apparently rely on the provisions of Section 3(a) of the Act. Where Section 3(a) applies, an agency may request the Secretary of Interior to undertake a survey and subsequent protection of data, or the agency may, with funds appropriated for the project, program or activity undertake the survey and protaction itself. However, Section 3(a) is clearly inapplicable to construction undertaken with FHA insurance. By its terms, Section 3(a) applies to a Federal agency's "activities in connection with any federal construction project or federally licensed project, activity or program." Construction undertaken by private parties pursuant to a program of FHA mortgage insurance is not a "federal construction project" nor is it "federally licensed". Rather, construction pursuant to FHA insurance programs is clearly covered by Section 3(b) of the Act, which applies where "any federal agency provides financial assistance by loan, grant, or other wise to any private person, association or public entity."

Under Section 3(b) it is the Secretary of Interior who, upon his own determination that significant archeological data exist and that such data may be lost or destroyed, may employ funds authorized for the purpose to conduct a survey of the site, and undertake the recovery, protection and preservation of such data.

Section 4 authorizes the Secretary of Interior, when notified by a Federal or state agency or historical or archeological authority that loss or destruction of significant data may occur, to conduct, or cause to be conducted, a survey or other investigation of the area and to recover and perserve such data. Section 4(c) directs the Secretary of Interior to initiate the survey or recovery effort within 60 days after notification (or at a time agreed upon with the agency head).

In addition, under both Sections 3(b) and 4 the Secretary of Interior has the responsibility to compensate any person, association, or public entity damaged as a result of delay in construction or as a result of the temporary loss of the use of private or any nonfederally owned land caused by the survey, retrieval or recovery work.

Thus, under these provisions of the Archeological and Historic Preservation Act it is the Secretary of Interior who has certain clear and exclusive responsibilities for the survey, retrieval and preservation of archeological data. We do not find that HUD has authority to assume the Secretary of Interior's responsibilities under the Act for archeological survey work nor to impose such responsibilities on our grantees, developers or other clients. Therefore, it is the responsibility of the Secretary of Interior to conduct surveys of the three subdivisions in question if the Secretary determines under Section 3(b) that such surveys are necessary or if HUD under Section 4 notifies the Secretary that loss of significant archeological data on a HUD project may occur.

We hold that HUD has met its obligation to identify and evaluate historic and cultural resources in these subdivisions through the steps described above. A program of Federal mortgage insurance cannot be the vehicle for completing, at FHA expense, the detailed national surveys of historic and archeological resources for which the Department of Interior has the responsibility, expertise, and funds under the National Historic Preservation Act. When such national identification is complete, there should be no further problems with preserving historic and cultural resources. In the meantime, HUD will continue to give the Department of Interior every opportunity under the Archeological and Historic Preservation Act to conduct such surveys and mitigation efforts as it can in the early stages of HUD-assisted projects.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Acting Deputy General Counsel

NOV 2 7 1979

Mr. James D. Webb
Associate Solicitor
Conservation and Wildlife
Department of the Interior
Washington, D. C. 20240

Dear Mr. Webb:

This is in response to your letter of November 5, 1979 concerning the final environmental impact statements (EIS's) for the Westglen, Westbourne and Sundown Subdivisions in Harris County, Texas. The EIS's in question were prepared in connection with review of FHA mortgage insurance for homes in the proposed developments.

In a letter of July 2, 1979 to Mr. Robert Embry, Assistant Secretary for Community Planning and Development, HUD, Mr. Larry Meierotto, Assistant Secretary, Department of the Interior, advised that he considered the EIS's inadequate because HUD failed to carry out any archeological survey of the project areas, to identify historic or cultural resources which may be eligible for the National Register of Historic Places. It was his contention that such surveys are the responsibility of HUD under the Archeological and Historic Preservation Act of 1974 (P.L. 93-291), the National Historic Preservation Act (NHPA), as implemented by 36 CFR 800 (revised in 44 F.R. 6068, January 30, 1979) and the National Environmental Policy Act (NEPA).

In a letter of August 29, 1979 to Mr. Meierotto, we expressed our view that the Archeological and Historic Preservation Act was not designed to substitute for NEPA and the NHPA or to impose a survey requirement that goes beyond an agency's initial responsibility under NEPA and NHPA of establishing and evaluating environmental impacts. We also advised that the Department had followed applicable procedures of the Advisory Council on Historic Preservation--36 CFR 800.4—to identify and evaluate historic and cultural resources under the NHPA.

As you indicated in your November 5, 1979 letter, you agree that the surveys in question are not the responsibility of HUD under the Archeological and Historic Preservation Act. However, you state that such surveys, where appropriate, should be a requirement for HUD approval of these subdivisions and a mandatory requirement for HUD approval of other projects of similar nature and potential impact under the NHPA and NEPA.

We disagree with the position expressed in your letter. HUD followed the procedures of NEPA and the NHPA to determine any environmental consequences of the subdivisions. Draft environmental impact statements were distributed for review and comment for the Westglen Subdivision on July 26, 1978, the Westbourne Subdivision on August 24, 1978, and the Sundown Subdivision on November 30, 1978. Pursuant to 36 CFR 800.4 HUD consulted the published lists of the National Register of Historic Places and subsequent updates and the State Historic Preservation Officer (SHPO), Truett Latimer of the Texas Historical Commission. Mr. Latimer expressed very general and vague concerns as to the potential effect of the subdivisions on unspecified and undetermined archeological and cultural resources and recommended that surveys be conducted to determine the existence and location of such resources. We note that under 36 CFR 800.4(a)(1) the SHPO should provide the Agency official "with any information available on Known historic and cultural properties identified in the area (whether on the National Register or not), informatinn on any previous surveys performed and an evaluation of their quality . . ." (emphasis added).

HUD carefully considered available information consistent with our legal duties and responsibilities under the Advisory Council procedures and concluded in the final environmental impact statements issued for the three subdivisions (Sundown, May 4, 1979, Westbourne, May 14, 1979, Westglen, May 19, 1979) that historic or cultural resources did not exist in the areas. The three subdivisions were subsequently approved for FHA mortgage insurance (Sundown on June 7, 1979, Westbourne and Westglen on June 14, 1979).

Statements were made in the Final EIS's that if a discovery of cultural or historical properties should be encountered at the site during construction, work would cease and the SHPO would be afforded the opportunity to investigate and comment. We have spoken with people in our Houston Area Office and they advise that the subdivisions are in the process of being developed for housing construction. No evidence of historic or cultural properties has been discovered to date.

As we stated in our letter of August 27, 1979, HUD followed the review processes for identifying historic and cultural resources in these subdivisions under the Advisory Council procedures. We reiterate that we can find no basis under the NHPA or the Advisory Council procedures for the Department of Interior or the SHPO's to require that HUD conduct further field surveys or excavations to prove the absence of historic or archeological properties. If evidence of something of historic or cultural value turns up during the review process, Federal agencies under § 800.4(a)(2) have the discretion to consider taking further action to identify eligible properties, which may include a professional cultural resources survey. In this instance no such evidence was discovered. In the absence of any such evidence, surveys of a proposed project site need not be considered.*

In our view, HUD has met its obligation to identify and evaluate historic and cultural resources in these subdivisions through the steps described above. As stated in the EIS's, if significant cultural resources in fact exist on the sites, and are discovered during site preparations, work will be stopped so that appropriate investigation can be undertaken.

We trust that the foregoing is responsive to your concerns.

Sincerely,

/s/ Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative Law

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*See 36 CFR 800.4 of the Advisory Council Procedures.

> "The Agency Official shall consult the State Historic Preservation Officer, the published lists of National Register and eligible properties, public records, and other individuals or organizations with historical and cultural expertise, as appropriate, to determine what historic and cultural properties are known to be within the area of the undettaking's potential environmental impact . . ." § 800.4(a)(1). "The Agency Official shall after due consideration of the information obtained pursuant to § 800.4(a)(1), determine what further actions are necessary to discharge the agency's affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's potential environmental impact . . ." § 800.4(a)(2).

13 JUL 1979

Note to: Joseph F. Gellectich

Subject: Applicability of Circular A-102 to Section 8 and Public Housing Under U. S. Housing Act of 1937

We have been asked to concur in the attached proposed memorandum to Assistant Secretary Simons. We are unable to do so because we do not agree with the conclusion that Circular A-102 is not applicable to any assistance under the public housing program or the Section 8 program. Our reasons are outlined below:

1. Paragraph 7 of Circular A-102 defines "grant" as follows:

> (a) The term "grant" or "grant-in-aid" means money, or property in lieu of money, paid or furnished by the Federal Government to a State, local, or federally recognized Indian tribal government under programs that provide financial assistance through grant or contractual arrangements. The term does not include technical assistance programs which provide services instead of money or other assistance in the form of general revenue sharing, loans, loan guarantees, insurance, or contracts which are entered into and administered under procurement laws and regulations.

We agree that were a housing authority to receive only a HUD loan or loan commitment under § 4(a) of the USHA, Circular A-102 would not apply to the recipient authority. However, in our opinion, annual contributions clearly fall within the above-quoted definition of grants covered by the Circular. The fact that the Secretary "guarantees" paymnt of debt service annual contributions and thereby assures payment of the principal and interest of a HUD or private loan does not convert the regular cash payments which HUD agrees to make into a form of mere "loan guarantee" exempt from the circular. (To so conclude would also be to remove those PHAs which receive only debt service annual contributions from enforcement of Title VI of the Civil Rights Act of 1964.) The term "guarantee" carries the implication that out-of-pocket Federal assistance for the performance of the recipient's obligations will be available only in the unlikely contingency that the recipient itself becomes unable to perform those obligations. However, in the public housing program the regular payment of Federal moneys "to assist in achieving and maintaining the low-income character of [the] projects" is clearly anticipated by HUD and the rdcipient. It becomes a cornerstone of the financial structure of the recipient and a continuing vital component in the recipient's normal ongoing operations.

2. The treatment of annual contributions as "grants" or "grants-in-aid" for the purposes of Circular A-102 must be determined by reference to the above-quoted definition contained in the Circular, rather than by reference to the repeal of "capital grant" authority in § 11 of the pre-1974 USHA. The capital grant authorized by § 11 appears to be an "alternative" form of assistance only in the sense that it was a one-shot payment, dependent upon a State contribution, as opposed to the periodic nature of annual contributions. Both types of assistance constitute money paid or furnished by the Federal government to a state, local, or Indian tribal government instrumentality. The fact that in the one case the instrument of agreement is called an Annual Contributions Contract is similarly immaterial since the A-102 definition covers assistance under grant *or contractual* arrangements.

3. You have indicated that debt service annual contributions are paid by HUD directly to the agents for holders of the PHA's obligations, rather than to the PHA. We regard this as a mere matter of convenience which is not indicative of a significant characteristic of the assistance provided or of the identity of its true recipient, since § 5 of the USHA authorizes "annual contributions to *public housing authorities* to assist in achieving and maintaining the low-income character of their projects" (emphasis added).

4. We cannot agree that public housing agencies which enter into annual contributions contracts with HUD under § 8

of the USHA are not covered by Circular A-102. While non-owning PHA's may operate more as administrators than recipients, § 8(b)(1) and (2) authorize annual contributions contracts between HUD and the PHA, and the assistance provided falls within the A-102 definition of "grant." With respect to PHA-owners, we are not persuaded that the Circular covers only grant programs that are limited to State and local governments qua governments, since the Circular is designed to reduce varying and conflicting administrative requirements imposed on the governments. The Circular's applicability to working subgrantees of a government is also specifically made dependent on whether the subgrantee is itself a government (Paragraph 6).

5. The Circular provides in Paragraph 9 for requests for exemptions, and presumably a request could initially be made for a ruling on applicability of the Circular to PHAs in the § 8 program. In view of the 1977 internal OMB memorandum you have cited, which concluded that the Circular does apply to PHA-administered § 8 assistance, we believe a new request to OMB for a ruling on applicability or an exemption should precede any conclusion by OGC that the Circular is inapplicable to § 8.

(signed) Irving P. Margulies

Irving P. Margulies

Attachment

11 SEP 1979

Milton F. Lunch, Esq.
General Counsel
National Society of Professional Engineers
2029 K Street, N. W.
Washington, D. C. 20006

Dear Mr. Lunch:

Thank you for your letters of July 26 and August 16, 1979 to the General Counsel. You advised that it is your understanding from one of your members that a memorandum of the Pittsburgh Area Office, dated May 14, 1979, subject: Required Competitive Selection of CDBG Program Services, OMB Circular A-102, is being interpreted by that office to mean that grantees are required under OMB Circular A-102, Attachment O, to secure competitive bids from engineering firms for projects financed under the block grant program.

The memorandum in question does not require that standard competitive bidding procedures be used by CDBG grantees in securing professional services contracts but rather that there be competition. We have been advised by the Philadelphia Regional Office that the memorandum is not being interpreted as requiring competitive bidding.

It has been the Department's position that contracts for professional services, which would include the services of attorneys, engineers, and city planners, may be procured by competitive negotiation under former Section 3(c)(6) of OMB Circular A-102, Attachment O (See present Section 11c of Attachment O, published as revised at 44 Fed. Reg. 47874, August 15, 1979).

We have not mandated any particular process through which the procurement of professional services should be accomplished. We have stressed only that the procurement must be conducted in a manner so as to provide maximum open and free competition as specified in Section 10a (and formerly in Section 3(b)) of Attachment O. Grantees, in the past, have been advised that public solicitations of interest in professional services contracts through advertisements in newspapers, trade papers and professional organizations are some of the ways in which open and free competition can be encouraged.

I hope the above information has been helpful in clarifying the Department's position with respect to procedures for procuring professional services under Circular A-102.

Sincerely,

Irving P. Margulies

Irving P. Margulies
Associate General Counsel
Finance and Administrative
Law Division

OCT 24 1979

William Medina, Assistant Secretary for
Administration

Irving P. Margulies, Office of General Counsel

Request for Opinion on Dole Amendment

This is in response to your memorandum of September 20, 1979 requesting our opinion concerning the applicability of the "Dole Amendment" to a proposed field reorganization of Indian Programs offices.

The proposed reorganization would provide for the establishment of a new Office of Indian Programs in the Regional Office of Region V (Chicago) serving all locations in Region I (Boston), Region II (New York), Region III (Philadelphia), Region IV (Atlanta), and Region V (Chicago) plus all locations in the State of Iowa. New Offices of Indian Programs would be established in Oklahoma City and Seattle, each serving several states, and Nebraska and New Mexico would be added to areas served by existing Indian Programs offices in Regions VIII and IX, respectively.

The Dole Amendment (Section 908 of the Housing and Community Development Amendments of 1978, Pub. L. 95-557, 95th Cong., 2nd Sess.)[1]

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[1] The Dole Amendment added the following paragraph to Section 7 of the Department of HUD Act:

> (p) A plan for the reorganization of any regional, area, insuring, or other field office of the Department of Housing and Urban Development may take effect only upon the expiration of 90 days after publication in the Federal Register of a cost-benefit analysis of the effect of the plan on each office involved. Such cost-benefit analysis shall include, but not be limited to—
>
> > (1) an estimate of cost savings supported by background information detailing the source and substantiating the amount of the savings;

amends Section 7 of the Department of Housing and Urban Development Act to provide that a plan for the reorganization of any regional, area, insuring, or other field office may take effect only upon the expiration of 90 days after publication in the Federal Register of a cost-benefit analysis of the effect of the plan on each office involved.

The Joint Explanatory Statement of the Managers of the Committee of Conference (Compilation of the Housing and Community Development Amendments of 1978, Committee on Banking, Finance and Urban Affairs, House of Representatives, 95th Cong., 2nd Sess., p. 135) establishes the intent of the Amendment as follows:

> The intent of this amendment is to assure that (1) the Department, when proposing a nationwide plan to transfer any of its operations from one field office (regional, area, or service office), to another considers the cost and benefits of such a plan and the impact of the plan on the various localities involved, and (2) that the public and Congress will be notified of the Department's intent to implement such a plan by publication in the Federal Register of a cost/benefit analysis of the plan. It is intended that this amendment apply to those reorganization plans which are (a) proposed by the Department in the future, (b) are national in scope, and (c) effect a reduction or transfer in the location or amount of services provided by the Department to the recipient of its services. This amendment is not intended to apply to or restrict the internal operations or organization of the Department (such as the establishment of new or combination of existing organization units within a field office, the duty stationing of employees in various locations to provide on-site service, or the establishment or closing, based on workload, of small, informal offices such as valuation stations.) The amendment is also not intended to restrict the movement or geographic location of the offices of the Department in any given metropolitan area.

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(2) an estimate of the additional cost which will result from the reorganization;

(3) a study of the impact on the local economy; and

(4) an estimate of the effect of the reorganization on the availability, accessibility, and quality of services provided for recipients of those services.

[W]here any of the above factors cannot be quantified, the Secretary shall provide a statement on the nature and extent of those factors in the cost-benefit analysis.

Discussion and Conclusion

Under the plain language of the Dole Amendment the cost-benefit analysis requirement is applicable. The Amendment clearly provides that a "plan for the reorganization of any regional, area, insuring, or other field office . . . may take effect only upon the expiration of 90 days after publication in the Federal Register of a cost-benefit analysis of the effect of the plan on each office involved." (emphasis added)

Moreover, we believe that the proposed reorganization clearly falls within the type of reorganization that the Conference Committee indicated the Amendment was intended to cover. The report of the Conference Committee establishes three criteria that a proposed reorganization plan must meet in order to trigger application of the cost-benefit analysis requirement. The use of the conjunction "and" indicates the Committee's intent that all three criteria it set out should be met before the Amendment would apply. The proposed reorganization does meet all three criteria.

First, there is no dispute that the reorganization is being proposed "in the future," i.e., after passage of the Amendment.

With respect to the second criterion, the Joint Statement quoted above makes clear that it is the intent of the Amendment to assure that the Department, "when proposing a nationwide plan to transfer any of its operations from one field office (regional, area or service office), to another considers the cost and benefits of such a plan and the impact of the plan on the various localities involved . . ." (emphasis added). It is not necessary that every field office or every region be included in a reorganization to qualify that reorganization as national in scope. The contemplated reorganization is a large and significant reorganization of Indian Programs offices affecting most of HUD's regions. This is the type of "national" reorganization to which the Amendment was intended to apply.

In addition, it is our opinion that the proposed reorganization also meets the third criterion mentioned in the Joint Statement, i.e., it will "effect a reduction or transfer in the location or amount of services provided by the Department to the recipient of its services." In this regard, a September 12, 1979 staff paper prepared at your request makes the following comment:

> The third condition is more difficult to demonstrate. The Region V consolidation could be perceived as a reduction in services to some recipients. Indian tribes in Regions I

> through IV, though not substantial in numbers, would have to go to Chicago instead of their local offices for service. In Region V some Indian programs are administered by Area Offices (predominately [sic] Milwaukee) and these recipients will also have to go to Chicago for service.
>
> However, it can be argued that the consolidation of the unique skills which are needed to administer Indian programs will so improve the level of services that it will counterbalance any reduction in the amount of services that the increased travel requirement might induce.

In our opinion, the staff paper provides inadequate justification for a conclusion that the level of Indian program services will be maintained. On the contrary, the proposed consolidation of services administered through five regional offices into one regional office raises a strong possibility of reduction in services to affected Indian tribes. Almost 30 percent of the total nationwide Indian population resides in the states which would be serviced out of the Chicago office under the proposed reorganization. (See comments of Senator Dole of Kansas and Senator Schmitt of New Mexico Vol. 124 Cong. Rec. No. 110, S11298-S11301, July 20, 1978, concerning the inability of the Department to provide adequate information on the effect on recipient services of a reorganization of multifamily housing and community planning and development functions in progress at the time, particularly in regard to consolidation of HUD offices in Kansas, New Mexico and other western states).

In any event, the third criterion in the Joint Statement requires only that a "reduction or transfer in the location or amount of services" (emphasis added) be contemplated. Since it appears that the reorganization would transfer the location of Indian Programs services for recipients in over half the states, the third criterion for applying the Dole Amendment will be met regardless of whether the quality of services is reduced.

In sum, since the proposed reorganization has been proposed after the enactment of the Dole Amendment, is national in scope, and will effect a reduction or transfer of services, a cost-benefit analysis pursuant to the Dole Amendment must be done for the proposed reorganization.

Irving P. Margulies

Associate General Counsel for
Finance and Administrative Law

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

July 23, 1979

Mr. Alan K. Campbell
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D. C. 20415

Attention: Larry Greene

Re: Comments on the Intergovernmental Personnel Act Amendments

Dear Mr. Campbell:

I am responding to your request that we identify statutes which impose personnel requirements as a condition of the receipt of grant-in-aid programs administered by HUD, and which therefore may be affected by the amendments to the Intergovernmental Personnel Act contained in the Civil Service Reform Act of 1978.

We have identified two statutes, applicable to HUD grant-in-aid programs, which affect personnel matters in the broad sense indicated in your letter. However, for the reasons outlined below, we believe that each statute is exempt from the abolition provisions of the IPA amendments and should remain in force.

1. Section 12 of the United States Housing Act of 1937, as amended (42 U.S.C. § 1437j).

This statute (see text enclosed) applies Davis-Bacon wage rates to laborers and mechanics employed in the development of low income housing projects by requiring appropriate provisions in any contract for loans, annual contributions, sale, or lease. In addition, the statute imposes a requirement separate from Davis-Bacon, although analogous, that wages prevailing in the locality, as determined or adopted by the Secretary of HUD, be paid to all architects, technical engineers, draftsmen, and technicians employed in the development of the housing project ("technical" wage rates), and all maintenance laborers and mechanics employed in the operation of the housing project ("maintenance" wage rates).

In our view the statute provides a wage standard rather than a "personnel requirement." Nevertheless, we have listed it here because you asked for statutes pertaining to compensation and because the Intergovernmental Personnel Act Amendments provide a specific exemption for the closely analogous Davis-Bacon Act. We believe that § 12 serves the same broad Congressional policy as the Davis-Bacon and related Acts, i.e., protection of wage standards for workers on a Federal or federally assisted program. It, therefore, should be considered to fall within the exemption for Davis-Bacon contained in § 208(h) of the IPA, as amended.

In support of this position we also note the following:

a. The general wage standard set forth in this section has been statutorily required since the enactment of the original United States Housing Act of 1937 (see 50 Stat. 896).

b. The technical and maintenance wage rate provisions, like the Davis-Bacon rates, apply to the various classes of employees without regard to whether they are employed by the local housing authority or by its contractors.

c. The technical and maintenance wage rates are applicable to recipients of loans, which are not "grants-in-aid," as well as to recipients of annual contributions, which are funds provided by contract with the public housing authority for the purpose of servicing the debt or subsidizing the operations of the authority.

d. As a practical matter, the public housing authority is generally a separate instrumentality which has been covered by the wage protection provisions of § 12 since 1937.

2. Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u).

Subsection (1) of Section 3 provides that in the administration of programs providing direct financial assistance, including community development block grants, the Secretary shall require that, to the greatest extent feasible, opportunities for training and employment be given to lower income persons residing in the area of a project. HUD regulations at 24 CFR 135.35(b) make clear that the provision pertains to personnel of the grantee as well as its contractors. (See 12 U.S.C. 1701u and 24 CFR 135.35, enclosed for your information.)

We note that § 208(h) of the IPA, as amended by § 602 of the Civil Service Reform Act, contains an exclusion from the abolition of personnel requirements in the case of "requirements that generally prohibit discrimination in employment or require equal employment opportunity." The section-by-section analyses of § 602 contained in both the Senate and the House Reports on the respective bills indicate that the exception is for requirements that "prohibit discrimination in employment or require equal employment opportunity or affirmative action . . ." (emphasis added) (S. Rep. No. 95-696, 95th Cong. 2d Sess. 95 (1978).)

While Section 3 is not phrased in terms of race or national origin, we believe the legislative history of Section 3 and amendments thereto indicate that its provisions (including § 3(2) relating to contracting opportunities) were enacted as an affirmative action measure. As stated in a report on a broadening amendment the section was intended to "broaden the scope of employment and business opportunity for lower income persons and aspiring minority entrepreneurs" (S. Rep. No. 91-392, 91st Cong., 1st Sess. 31 (1969), describing an amendment which broadened Section 3 in 1969 to apply to non-housing programs). That same report indicated that Section 3 did not require disbanding of an existing workforce, but merely the hiring of any necessary new workers, if at all possible, from persons in the area. (See S. Rep. No. 91-392, 91st Cong. 1st Sess. 30-31 (1969); also excerpt from S. Rep. No. 1123, 90th Cong., 2d Sess.; both enclosed.)

We note that Section 3 requirements implement a Congressional policy of broad scope. While the requirements are applicable to force account personnel and personnel of a state or local government grantee which administer a grant-in-aid program, the primary impact of Section 3 employment requirements (and implementing HUD regulations at 24 CFR Part 135) is upon contractors of the grantee and upon private grantees.

I hope this information is helpful to you. Please notify us of your views regarding the effect of the IPA amendments on these statutes.

Sincerely,

Edward W. Norton
Acting General Counsel

Enclosures

Section 12 of the United States Housing Act of 1937

"Any contract for loans, annual contributions, sale, or lease pursuant to this Act shall contain a provision requiring that not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State or local law) by the Secretary, shall be paid to all architects, technical engineers, draftsmen, and technicians employed in the development, and all maintenance laborers and mechanics employed in the operation, of the low-income housing project involved; and shall also contain a provision that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (49 Stat. 1011), shall be paid to all laborers and mechanics employed in the development of the project involved (including a project with nine or more units assisted under section 8 of this Act, where the public housing agency or the Secretary and the builder or sponsor enter into an agreement for such use before construction or rehabilitation is commenced), and the Secretary shall require certification as to compliance with the provisions of this section prior to making any payment under such contract."

§ 1701t. Congressional affirmation of national goal of decent homes and suitable living environment for American families

Limitation on Withholding or Conditioning of Assistance. Assistance provided for in Housing and Community Development Act of 1974, National Housing Act, United States Housing Act of 1937, Housing Act of 1949, Demonstration Cities and Metropolitan Development Act of 1966, and Housing and Urban Development Acts of 1965, 1968, [see Short Title note set out hereunder], 1969, and 1970 not to be withheld or made subject to conditions by reason of tax-exempt status of obligations issued or to be issued for financing of assistance, except as otherwise provided by law, see section 817 of Pub.L. 93-383, set out as a note under section 5301 of Title 42, The Public Health and Welfare.

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Responsibility of Department of Housing and Urban Development 2
Warranty 1

1. Warranty

Implied warranty of habitability was breached by sale of home by Department of Housing and Urban Development where the home contained quantities of lead-based paint in excess of standards set by city code and regulations thereunder. City of Philadelphia v. Page, D.C.Pa.1973, 363 F.Supp. 148, motion denied 373 F.Supp. 453.

2. Responsibility of Department of Housing and Urban Development

Wide latitude of discretion which Department of Housing and Urban Development is granted under this chapter by necessity includes consideration of its affirmative obligations to administer programs and activities relating to housing and urban development in manner to further policies of nondiscrimination in housing consistent with Fair Housing Act of 1968, section 3601 et seq. of Title 42. Sadler v. 218 Housing Corp., D.C.Ga.1976, 417 F.Supp. 348.

Department of Housing and Urban Development has affirmative obligation to follow policies set up by this chapter, however, there exists broad discretion in agency to choose between alternative methods of achieving national housing objectives. Id.

§ 1701u. Employment opportunities for lower income persons in connection with assisted projects

In the administration by the Secretary of Housing and Urban Development of programs providing direct financial assistance, including community development block grants under title I of the Housing and Community Development Act of 1974, in aid of housing, urban planning, development, redevelopment, or renewal, public or community facilities, and new community development, the Secretary shall—

(1) require, in consultation with the Secretary of Labor, that to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such program be given to lower income persons residing in the area of such project; and

(2) require, in consultation with the Administrator of the Small Business Administration, that to the greatest extent feasible contracts for work to be performed in connection with any such project be awarded to business concerns, including but not limited to individuals or firms doing business in the field of planning, consulting, design, architecture, building construction, rehabilitation, maintenance, or repair, which are located in or owned in substantial part by persons residing in the area of such project.

As amended Pub.L. 91–152, Title IV, § 404, Dec. 24, 1969, 83 Stat. 395; Pub.L. 93–383, Title I, § 118, Aug. 22, 1974, 88 Stat. 653.

References in Text. Title I of the Housing and Community Development Act of 1974, referred to in text, is Title I of Pub.L. 93-383, §§ 101-118, Aug. 22, 1974, 88 Stat. 633–653. For distribution of such Title in this Code, see Tables volume.

1974 Amendment. Pub.L. 93-383 added reference to community development block grants under Title I of the Housing and Community Development Act of 1974.

1969 Amendment. Pub.L. 91-152 substituted provisions making applicable programs providing direct financial assistance in aid of housing, urban planning, development, redevelopment, or renewal, public or community facilities, and new community development, for provisions making applicable programs authorized by sections 1715l(d)(3), 1715z, and 1715z-1 of this title, the low-rent public housing program under the United States Housing Act of 1937, and the rent supplement program under section 101 of the Housing and Urban Development Act of 1965.

Legislative History. For legislative history and purpose of Pub.L. 91-152, see 1969 U.S.Code Cong. and Adm.News, p. 1524. See, also, Pub.L. 93-383, 1974 U.S.Code Cong. and Adm.News, p. 4273.

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Class action 4

Federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of Housing and Urban Development, 24 CFR Part 135. The contractor will not subcontract with any subcontractor where it has notice or knowledge that the latter has been found in violation of regulations under 24 CFR Part 135 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.

E. Compliance with the provisions of section 3, the regulations set forth in 24 CFR Part 135, and all applicable rules and orders of the Department issued thereunder prior to the execution of the contract, shall be a condition of the Federal financial assistance provided to the project, binding upon the applicant or recipient for such assistance, its successors, and assigns. Failure to fulfill these requirements shall subject the applicant or recipient, its contractors and subcontractors, its successors, and assigns to those sanctions specified by the grant or loan agreement or contract through which Federal assistance is provided, and to such sanctions as are specified by 24 CFR Part 135.

§ 135.25 Bidding and negotiation requirements.

(a) Every applicant and recipient shall require prospective contractors for work in connection with section 3 covered projects to provide, prior to the signing of the contract, a preliminary statement of work force needs (skilled, semiskilled, unskilled labor and trainees by category) where known; where not known, such information shall be supplied prior to the signing of any contract between contractors and their subcontractors.

(b) When a bidding procedure is used to let the contract, the invitation or solicitation for bids shall advise prospective contractors of the requirements of these regulations. When the contract is let pursuant to negotiation or methods other than formal bidding procedures, prospective contractors shall be advised by the contracting party of the requirements of these regulations as part of the contract specifications.

§ 135.30 Other applicant and recipient obligations.

Every applicant and recipient shall assist and actively cooperate with the Secretary in obtaining the compliance of their contractors and subcontractors with the requirements of these regulations, including cooperation and assistance in distributing and collecting forms and information, and in notifying contracting parties and contractors of violations of these regulations, and shall refrain from entering into any contract with any contractor after notification by the Department that the contractor has been found in violation of these regulations pursuant to § 135.110(j).

§ 135.35 Effectuation of applicant obligations in direct and indirect relationships.

(a) Where the applicant for assistance under a section 3 covered project and the recipient of such assistance are not one and the same, the recipient shall be regarded as the successor in interest of the applicant and shall have the same obligations as the applicant with respect to compliance with these regulations. These obligations shall be incorporated, specifically or by reference in the loan or grant agreement or other contract or agreement through which the assistance is provided to the recipient.

(b) Where the applicant or recipient itself will perform all or part of the work in connection with a section 3 covered project within the meaning of these regulations, with either permanent or temporary staff by force account, it will provide the Department with all forms and assurances required of a contractor or subcontractor by these regulations prior to the execution of any loan or grant agreement or other contract or agreement through which assistance is provided.

(c) Where the applicant, recipient or contractor sells, leases, transfers or otherwise conveys land upon which work in connection with a section 3 covered project within the meaning of these regulations is to be performed (for example, under the Urban Renewal or Neighborhood Development program), it shall include in each contract

AUTHORIZATION FOR PROPERTY ACQUISITIONS IN APPLYING ADVANCES IN TECHNOLOGY TO HOUSING AND URBAN DEVELOPMENT

Section 402 of the bill would amend section 1010(c) of the Demonstration Cities and Metropolitan Development Act of 1966 to clarify the authority of the Secretary to use funds made available under section 1010 to acquire land and other property where necessary to facilitate the testing of advances in technology in housing construction, rehabilitation, and maintenance under actual on-site conditions.

This committee indicated when considering section 1010 in 1966 that one of the purposes of this research program was to carry out on-site demonstrations of advanced technologies and not merely paper studies. It is expected that cases would arise only occasionally where it would be necessary for the Secretary to acquire land for demonstration purposes and that the total cost of land acquisition would use up only a relatively small part of the research funds authorized and appropriated for this program. The committee understands that if it is necessary for the Secretary to acquire land, he would purchase by negotiation and that eminent domain would only be used in rare cases.

EXTENSION OF CERTAIN PROVISIONS OF LAW RELATING TO HOUSING AND URBAN DEVELOPMENT TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS

Section 403 of the bill would amend sections 9, 203, and 207 of the National Housing Act to make available FHA home and multifamily mortgage insurance and title I property improvement loan insurance to the Trust Territory of the Pacific Islands. The section would also make the Trust Territory of the Pacific Islands eligible for assistance under the low rent housing program and the public facility loan program.

Your committee believes that extension of these mortgage and loan insurance and public facility loan programs of the Department of Housing and Urban Development to the Trust Territory of the Pacific Islands could make a major contribution to the welfare of that area, a responsibility the United States accepted under its trusteeship agreement with the Security Council of the United Nations.

EMPLOYMENT OPPORTUNITIES FOR LOWER INCOME PERSONS IN CONNECTION WITH HUD ASSISTED PROJECTS

Section 404 of the bill would amend section 3 of the Housing and Urban Development Act of 1968 to require the Secretary of Housing and Urban Development, in the administration of programs providing financial assistance in aid of housing, urban planning, development, redevelopment, or renewal, public or community facilities, and new community development to require (1) that to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of projects assisted under such programs be given to lower income persons residing in the project area and (2) that, to the greatest extent feasible, contracts for work to be performed in connection with any such projects be awarded to business concerns which are located in or owned in substantial part by persons residing in the area of the project. Under existing law these employment and work opportunity requirements are only applicable to administration of the section 235 homeownership, the section 236 rental assistance, the section 221(d)(3) below market interest rate, public housing and the rent supplements programs.

It is the opinion of your committee that the provisions and spirit of section 3 should be extended to include federally assisted programs of urban planning, development, redevelopment, or renewal; public or community facilities; and new community development. This extension would greatly broaden the scope of employment and business opportunity for lower income persons and aspiring minority entrepreneurs.

The committee felt the need for clarifying language on the proper interpretation of the phrase "to the greatest extent feasible" in reference to a contractor moving into a neighborhood with an already established coterie of foremen and key workers. It is the committee's feeling that this provision does not intend that the contractor disband his organization by replacing them with local workers or local contractors. However, to the extent that outside workers and subcontractors are needed, the intent of the provision is that such people should be hired, if at all possible, from persons or business establishments in the area.

URBAN PROPERTY PROTECTION AND REINSURANCE—ENTRY INTO REINSURANCE CONTRACTS

Section 405 of the bill would amend section 1222(d) of the National Housing Act to permit reinsurance contracts for riot or civil disorder losses to be entered into during the course of the entire reinsurance contract year. At present, only companies which are newly authorized to write insurance may enter into reinsurance contracts after the contract year begins. Other companies which do not enter into a reinsurance contract within 90 days of the beginning of the contract year must wait until the next contract year to obtain Federal reinsurance. This amendment would permit the Secretary to offer reinsurance coverage during the course of the contract year as an incentive for States to adopt FAIR plans and for companies to join FAIR plans at the earliest possible date. It would also permit the timely provision of reinsurance coverage to companies which are newly active in the mandatory lines of property insurance or substantially increase their writing of such insurance.

URBAN PROPERTY PROTECTION AND REINSURANCE—STATE SHARE OF REINSURED LOSSES

Section 406 of the bill would amend section 1223(a)(1) of the National Housing Act to extend, to the close of the second full regular session of the State legislature following August 1, 1968, the time within which State legislation must be enacted to provide for reimbursement to the Secretary of a share of the reinsured property insurance losses he has paid. At present, State legislation is required by August 1, 1969, or, if the State legislature has not met in regular session before that date, by close of its next regular session. Without such legislation, reinsurance of losses from riots or civil disorders will be un-

Senate Report (No. 1123, on S. 3497).

On May 15, 1968 the full Senate Banking and Currency Committee reported out S. 3497, a bill to be cited as the Housing and Urban Development Act of 1968. Section 3 of that bill read as follows:

> "In the administration of the programs authorized by sections 235 and 236 of the National Housing Act, the below-market interest rate program under section 221(c)(3) of such Act, the low-rent public housing program under the United States Housing Act of 1937, and the rent supplement program under section 101 of the Housing and Urban Development Act of 1965, the Secretary of Housing and Urban Development shall require that, to the greatest extent feasible, opportunities for employment arising in connection with the construction or rehabilitation of housing assisted under such programs be given to lower income persons residing in the area of such housing."

In reporting his individual views on the S. 3497 Senator Percy made the following statement on this provision:[3]

> The committee adopted an amendment jointly sponsored by Senator Proxmire and myself which directs the Secretary to require, to the maximum extent feasible, the use of resident labor in the construction of low income housing. Nothing is more defeating to the residents of a low income black neighborhood, often out of work themselves, than to see white construction workers from outside the community arrive every morning to build housing in their neighborhood. I fully recognize the many practical problems involved, but nevertheless feel we must do much more in finding ways whereby these individuals can begin to learn a trade. A job of the most menial kind on a construction site could be the work conditioning needed to qualify an individual for a regular apprenticeship program. A variety of programs could be undertaken in this area and I sincerely hope that American labor will join with the Secretary in looking for new and innovative programs to employ ghetto residents in the rebuilding of their own neighborhoods. In many cases, participation in the rebuilding could mean as much, or possibly even more to the neighborhood, than the new units themselves."

27 JUL 1979

Angelo Scioscia, Office of Surplus Land
and Housing, New Community
Development Corporation

SIGNED

Irving P. Margulies, Office of General Counsel, GH

Proposed 414 Project: Inchon Village, San Francisco, California

This is in response to your request for our opinion on three questions concerning the above-referenced project.

1. What HUD-administered housing programs constitute a "housing assistance program" as referred to in Section 414(a) of the statute?

In 1978 Congress adopted amendments to Section 414 intended to achieve "greater utilization of surplus land and property for housing." (H.R. 1161, 95th Cong., 2d Sess. (1978)). One of these amendments replaced the previous itemization of federal housing subsidy programs which could be used in meeting the Section 414 eligibility test with the term "federal housing assistance programs."

The intent of this provision was to permit any federal housing program to qualify as a "housing assistance program" so long as it was designed or could be structured to provide housing to be occupied by predominately low and moderate income families or individuals. The plain language of Section 414 also permits state and local housing programs to qualify if they were designed or could be structured to provide housing to be occupied by predominantly low and moderate income families or individuals.

2. What percentage of the units of housing projects must be occupied by assisted families in order to meet the "predominance" requirement of Section 414(a) of the statute?

The word "predominantly" was added by the 1978 Amendment. The only reference to this addition is in House Report No. 95-1161 which states:

> "Under existing law, the word 'predominantly' was not included, and proposed uses which were not exclusively directed toward low and moderate income families could have been excluded. Such an interpretation is clearly inconsistent with providing opportunities for economic mix in housing development." (Emphasis added).

While the legislative history of the use of the "predominance" standard generally calls for an economic mix and not a 100% low and moderate income assistance requirement, it does not give guidance as to minimum requirements. Case law generally construes "predominant" to mean that the class is of greater force and effect than other classes with which it is connected or compared. Mattocks v. Bliss, 22 Pick. (Mass.) 53; Lower v. Shaffner Mercantile Co., 109 F.2d 956, 959 (1940).

Applying these principles to the above question, we conclude the devotion of more than 50% of project units to assisted housing will always satisfy the "predominance" standard. This conclusion does not rule out the possibility that under certain circumstances, such as impaction on an existing neighborhood, justification might exist for going below the 50% level.

3. Are protection and maintenance costs paid by the San Francisco Housing Authority eligible for reimbursement?

The protection and maintenance costs paid by the San Francisco Housing Authority prior to ownership of the property are not eligible as such for direct reimbursement from mortgage proceeds by inclusion in the insurable mortgage amount. The insurable mortgage amount for this project would be based upon the determination of the replacement cost of the project when the proposed physical improvements are completed. Included in that determination for the purposes of a project involving rehabilitation is an amount representing the value of the land and existing improvements "as is" before repair or rehabilitation. Costs borne by a prospective purchaser to protect and maintain the project property prior to ownership would not usually affect the determination of that "as is" value.

However, the protection and maintenance expenses incurred by the San Francisco Housing Authority could have an indirect effect upon the determination of the insurable mortgage amount. In the case of rehabilitation, the determination of the replacement cost component attributable to the value of the land and existing improvements is based upon the lesser of the purchase price of the land and improvements or the FHA estimate of the "as is" value of the land and improvements before repair and rehabilitation. If it is determined that those expenses undertaken by the San Francisco Housing Authority were a necessary condition for the purchase of the property, those costs could be included in the determination of the actual cost of acquisition or the total purchase price. Accordingly, assuming that the "as is" value of the land and improvements is equal to or greater than the purchase price of the land and improvements (which depending upon the above determination presumably would include the protection and maintenance costs incurred to ownership), then the insurable mortgage amount would indirectly reflect the protection and maintenance costs.

Associate General Counsel
Finance and Administrative Law

27 JUL 1979

Angelo Scioscia, Office of Surplus Land
and Housing, New
Community Development
Corporation

Irving P. Margulies, Office of General Counsel, GF

Proposed 414 Project: Inchon Village, San Francisco,
California

This is in response to your May 21, 1979 memorandum requesting our opinion as to whether mortgage financing provided by the California State Housing Finance Agency (CHFA) constitutes a local "housing assistance program."

CHFA, a California agency created by Assembly Bill No. 1 of 1975, offers a wide range of housing programs, including a Homeownership and Home Improvement Loan Program In Neighborhood Preservation Areas (HOHI) which assists low and moderate income persons to purchase or rehabilitate their homes with loans at below market interest rates. (The current rate is 7 1/2%). To do this, CHFA sells tax-exempt bonds and uses the proceeds to buy home loans from participating lenders. These lenders, in turn, are able to make below market interest rate loans available to low and moderate income persons because they know CHFA will buy these loans from them (Section 41455 of Assembly Bill No. 1 of 1975).

The HOHI Program assists low and moderate income persons to purchase homes, it is similar in this respect to HUD's Section 235 program which offers interest reduction assistance for home ownership acquisition. Other similarities between the programs are that they are both statutorily designed to assist low and moderate income persons (see attached letter from the General Counsel of CHFA) and permit low down payments. With respect to income eligibility requirements, the programs are comparable, although not identical. While Section 235 assists persons or families having adjusted annual incomes not exceeding 95 percent of the medium income for the area with adjustments up to 119 percent for large family size, 24 CFR 235.10, HOHI assists low income persons not exceeding 80 percent of median and moderate income persons not exceeding 120 percent of median. In light of Congressional intent to provide an economic mix in Section 414 projects, the difference in income eligibility requirements between the programs should not prevent a finding that the HOHI Program is essentially similar to Section 235.

The HOHI Program of CHFA is a state housing program similar to a federal housing program which is designed to assist persons of low and moderate income and is thus a "housing assistance program" within the contemplation of Section 414(a).

Associate General Counsel
Finance and Administrative Law

Attachment

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

September 5, 1979

MEMORANDUM TO: Bryant L. Young, Acting General Manager
New Community Development
Corporation

SUBJECT: Sewage Treatment Plant supplementary grant for Warren County, North Carolina

This is in response to your request for our opinion regarding a prospective supplementary grant under Section 718(a) of Title VII for a sewage treatment plant in Warren County, North Carolina.

On August 4, 1978, HUD, EPA, and EDA entered into a memorandum of understanding which provided that under certain circumstances, including approval of grant applications by respective agencies, HUD would make a grant under Section 718(a) in an amount then estimated at $735,000. HUD's purpose for making the grant was specified as its involvement in the Soul City new community. To date, no such grant has been approved. In the letter to Warren County dated October 31, 1978, General Manager White stated: "Upon notification by you of the approval of the basic grant project by the Federal grantor agency and our final determination that the basic grant project is necessary or desirable for carrying out the new community development program, we will transfer the eligible amount of reserved funds to that agency for disbursement to you through that agency's normal grant disbursement system."

In applicable part, Section 718(a) provides that the Secretary is authorized to make supplementary grants if the "Secretary determines that such project is necessary or desirable for carrying out a new community development program . . . . " Under Section 711, a new community development program is a program "which is intended to result in a newly built community . . . and which meets the eligibility standards set forth in Section 712.'

On June 28, 1979, the Board of the New Community Development Corporation adopted a resolution which directed the General Manager to develop a plan of acquisition for Soul City. This resolution constituted the *bona fide* determination to acquire the project as contemplated by a January 22, 1976 decision of the Comptroller General, and directed the General Manager to curtail the funding of existing grants which were not necessary or desirable for the plan of acquisition. The Board resolution appears to constitute a determination that the Soul City project will not develop as a newly built community as originally contemplated. The resolution adopted at the August 30, 1979 Board meeting which authorized foreclosure of the project confirms this conclusion.

As a prerequisite for approving a grant under Section 718(a), the Secretary (usually the General Manager of NCDC) must first make the determination that the supplementary grant to build a sewage treatment plant for Warren County is necessary or desirable for a program that is intended to result in a newly built community (in this case, Soul City). In the face of the resolutions of the NCDC Board regarding Soul City, we see no basis on which this determination could currently be made and therefore no basis on which this supplementary grant can be approved.

However, there is an alternative funding source available to the Secretary. In connection with the acquisition and termination of the Gananda new community project near Rochester, New York, the Department consulted with the Comptroller General regarding the extent of its authority to make payments from the Section 717 Revolving fund as part of its plan to acquire and dispose of that community. The resulting opinion of the Comptroller General, dated July 9, 1975, concluded that the Secretary had considerable latitude in making discretionary payments. Following that opinion, substantial payments from the revolving fund were made to various public and private bodies involved in the Gananda project including payments characterized as moral obligations. We believe that a similar rationale (citing in particular the Memorandum of Understanding of which HUD is signatory) could justify payment of the equivalent of the supplementary grant amount for the Warren County Sewage treatment plant as part of the project acquisition and disposition. This is particularly so where negotiations involving disposition of the project contemplate transfer of various property interests to the State and to local bodies.

Edward W. Norton
Acting General Counsel

SEP 14 1979

Mr. Donald C. Olson
Chief, Office of Outdoor Recreation Services
Ohio Department of Natural Resources
Fountain Square
Columbus, Ohio 43224

Dear Mr. Olson:

Re: Transfer of HUD-Acquired Property to Ohio Department of Natural
Resources for Park Purposes

This is in response to your letter of June 27, 1979, which confirmed the request by Mr. Cook of your staff on that date for advice as to whether or not HUD could donate to the State of Ohio Department of Natural Resources ("ODNR") for use as a state park the western approximately 2230 acres of the real property at Newfields to be acquired by HUD through a pending foreclosure action and negotiated settlement with the Newfields developer and other interested parties. A contract for the sale of such land to the State of Ohio for $4 million had already been executed, and approval of the comprehensive Newfields settlement, including the agreement for sale of that acreage to the State, was on the agenda for the meeting of the Board of Directors of the New Community Development Corporation which took place on the afternoon of Mr. Cook's request.

In accordance with our preliminary indication to Mr. Cook, we have concluded that, under the circumstances which govern the Newfields settlement, HUD cannot legally make a donation of that property to the State of Ohio. While it appears that under its enabling legislation, the New Community Development Corporation would have authority to donate land to a state agency in a proper case, we do not believe that the facts and circumstances underlying the Comprehensive Settlement Agreement applicable to Newfields, to which the sale of land to the Ohio Department of Natural Resources is crucial, would justify the exercise of such authority.

You have advised us that ODNR wants to utilize Federal Land and Water Conservation Fund assistance to acquire the subject park land. We were not aware of ODNR's intention when we negotiated the Comprehensive Settlement Agreement controlling HUD's acquisition and disposition of the Newfields project. Even so, that circumstance should not have affected the course of dealings between ODNR and HUD, since HUD's mission and interests in dealing with this case of a failed new community is wholly distinct from the mission of Interior's Heritage Conservation and Recreation Service. The Newfields Comprehensive Settlement Agreement was made possible and premised, only after lengthy negotiation and earlier failures to reach agreement among the interested parties, upon the agreement by the State of Ohio to purchase the 2236 acres of land from HUD for $4 million in cash, its approximate fair market value as determined by recent appraisal. The NCDC Board approved the settlement plan on that explicit basis, being particularly concerned with the level of recovery to HUD after agreed obligations related to the settlement program have been satisfied.

The statutory authority of the Secretary to deal with property acquired in connection with the exercise of the Secretary's remedies against new communities is granted under Section 726(3) of the Urban Growth and New Community Development Act of 1970, as amended, Title VII, Housing and Urban Development Act of 1970, 42 U.S.C. 4511-32, as amended, ("Title VII"). Although this authority is framed in broad terms, the Comptroller General has indicated that it is not unlimited.

Section 726(3) of Title VII provides in part:

> In the event of any such acquisition [of a new community], the Secretary may, notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, complete, administer, remodel and convert, dispose of, lease, and otherwise deal with, such property. Notwithstanding any other provisions of law, the Secretary shall also have the power to pursue to final collection by way of compromise or otherwise all claims acquired by him in connection with any security, subrogation, or other right obtained by him in administering this part.

In responding to the contention of the Heritage Conservation and Recreation Service that NCDC had authority to transfer "default lands to a public agency at up to 100 percent discount when it can be shown to be in the Federal interest" we look as a matter of HUD policy, to the extent that their application does not impair or adversely affect the administration of the new communities program, to the uniform standards and criteria set forth in the Federal Property Management Regulations, although the land in question obviously can not be considered to be surplus property. 41 CFR 101-47.501-4, Findings, indicates when disposition of land may be made to a state for no consideration. The stated criteria limit this option to situations in which the property has no commercial value or in which the estimated cost of continued care and handling of the property would exceed the estimated proceeds from its sale. Neither criterion could be satisfied in the instant case. On the other hand, the guidelines of 41 CFR 101-47.304-9 provide authority for the negotiated sale for current fair market value to the State of Ohio under the applicable contract of sale between ODNR and HUD. Application of these constraining guidelines does not impair administration of the new communities program under present circumstances.

Underlying the foregoing conclusions are the facts that the amount of land involved for the Newfields park land sale, 2236 acres, is very large, comprising over half of the original new community project. Other than special use as a State park, the current highest and best use of the land would be farmland. Much of it is presently under cultivation and it is considered to be readily salable as farm land with a substantially similar level of financial recovery to HUD if it were not sold to the State for park use. At the recently appraised value of slightly over $4 million, this easily segregated portion of a new community project in process of acquisition and disposition represents a valuable major asset with a high expectance of recovery through liquidation to be credited against HUD's losses of more than $22 million related to the Newfields project.

It is significant that this block of land was never planned as park land in connection with ongoing Title VII development of the project. No obligation of the developer or significant programmatic or statutory purpose is achieved by disposition of the land as park. Commitment of the land to park use is not indispensable to HUD's responsible and orderly disposition of the Newfields project; however its agreed sale to the State of Ohio provides proceeds to effect a rapid, convenient, and mutually beneficial settlement with other parties whose cooperation is required for such a responsible and orderly disposition. Nor could donation for park use be justified as minimizing damage to any local government, or failure to donate frustrate expectations generated by an open course of dealings.

Consequently, for HUD to forego payment for conveyance of the subject land to the State of Ohio cannot, in our opinion, be legally justified under present circumstances. We believe that sale of this projected park land to the State of Ohio for the agreed consideration was a crucial factor in causing a number of parties to acquiesce in the Comprehensive Settlement Agreement. Removal of this linchpin could collapse the carefully controlled settlement of the project-related litigation. Under the circumstances, therefore, we must view such a donation as you have described as not allowable under legal and program strictures.

We trust the above information is responsive to your needs.

Sincerely,

SIGNED

Irving F. Margulies
Associate General Counsel
Finance and Administrative Law

CONSUMER PROTECTION

READEX FICHE best copy available

AUG 17 1979

Gloria M. Jimenez, Federal Insurance
Administrator

K. H. Sauerbrunn, Regulatory Programs Division, GR

12 U.S.C. 1749bbb - 9(a)(1) and the State of Kansas

Pursuant to your request of August 6, 1979, we have reviewed the proposed notice regarding the applicability of reinsurance coverage in Kansas and offer the following comments.

The statute and contract provide that reinsurance shall not be applicable to policies unless the appropriate state reimbursement legislation is enacted. 12 U.S.C. §1749bbb - 9(a)(1); Reinsurance Contract, Section XII. Both the statute and contract permit reinsurance to continue in effect with respect to policies reinsured prior to termination if the insurer pays the proper premiums. 12 U.S.C. §1749bbb - 9(b), Reinsurance Contract, Section XII. The proposed notice should be redrafted to include the requirement that the insurer must pay reinsurance premiums to continue reinsurance with respect to policies reinsured prior to termination.

In addition, it is possible that a question may be raised as to whether thirty-days written notice of the termination is required. The reinsurance contract provides in Section VI—Cancellations that reinsurance may be cancelled upon 30 days written notice to the company stating the reasons for cancellation. Termination pursuant to §1749bbb - 9(a)(1) is not one of the grounds specified in that section of the contract but is provided for in Section XII of the Contract.

Thus, a termination of the reinsurance contract because the state reimbursement statute has lapsed is not subject to the notice provisions in Section VI of the reinsurance contract.

K. H. Sauert

Associate General Counsel

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : John S. Mason, Director,
Enforcement Division,
Office of Mobile Home Standards

DATE: NOV 21 1979

IN REPLY REFER TO:

FROM : K. H. Sauerbrunn, Regulatory Programs Division, GR

SUBJECT: Supplemental Legal Opinion: Conflict Between Energy Standards Promulgated Under the Energy Policy and Conservation Act and Regulations Adopted by HUD Pursuant to the National Mobile Home Construction and Safety Standards Act of 1974.

I. ISSUE: Are energy efficiency standards promulgated under the Energy Policy and Conservation Act (as amended) applicable to appliances which are exclusively designed for use in mobile homes and are not intended for other residential applications?

II. ANSWER: Yes. The Energy Policy and Conservation Act does not discriminate between appliances designed for use in mobile homes and those designed for other residential applications. The statute applies to designated classes of products marketed for individual use. It does not (as is pertinent here) focus on the structures in which those products are used.

III. DISCUSSION:

A. Background.

In your memorandum of February 7, 1979 we were advised that certain features of the Energy Policy and Conservation Act, 42 U.S.C. §§6201 et. seq. (1978), as amended by the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 ("Energy Act") conflict with HUD energy efficiency standards. The energy standards in question apply to household appliances used in mobile homes and conventional houses. In our subsequent legal opinion of May 23, 1979 (copy attached) we concluded that energy efficiency standards to be implemented under the Energy Act preempt conflicting standards established by HUD as they pertain to those household appliances.

B. Appliances Designed Exclusively For Use in Mobile Homes

The Energy Act applies to covered consumer products which are defined at 42 U.S.C. §6292 (1978) as follows:

> (a) A consumer product is a covered product if it is one of the following types (or is designed to perform a function which is the principal function of any of the following types):
>
> (1) Refrigerators and refrigerator-freezers.
>
> (2) Freezers
>
> (3) Dishwashers.
>
> (4) Clothes dryers.
>
> (5) Water heaters.
>
> (6) Room air conditioners.
>
> (7) Home heating equipment, not including furnaces.
>
> (8) Television sets.
>
> (9) Kitchen ranges and ovens.
>
> (10) Clothes washers.
>
> (11) Humidifiers and dehumidifiers.
>
> (12) Central air conditioners.
>
> (13) Furnaces
>
> (14) Any other type of consumer product which the Administrator classifies as a covered product under subsection (b) of this section.

The term "consumer product" is broadly defined as "any article . . . which in operation consumes or is designed to consume, energy; and . . . is distributed in commerce for personal use or consumption by individuals . . . . 42 U.S.C. §6291(a)(1)(1978). The Energy Act mandates that the Department of Energy establish a program designed to improve the energy efficiency of the covered consumer products listed above. *See* Legal Opinion of May 23, 1979 at p. 1-3.

You have asked whether the Energy Act would apply to products exclusively designed and sold for use in mobile homes. As pointed out above the Energy Act bears on this question only in the case of "covered consumer products . Therefore if the appliances in question do not fit within a class listed above they would not be covered and would thus be subject to HUD energy standards.

Note, however, that the cited section does not discriminate between appliances designed exclusively for mobile homes, and those designed solely for other residential applications. The Energy Act is applicable to the listed appliances in *all* their uses and applications.

To be a "covered consumer product and thus subject to the Energy Act the appliance in question must be: (i) distributed in commerce for personal use or consumption by individuals . . . 42 U.S.C. §6291(a)(1)(1978); (ii) designed to consume energy and; (iii) be listed as a covered product. The focus of the statute is on classes of appliances. The Energy Act is applicable to covered consumer products whether they are used in mobile homes or conventional homes.

IV. CONCLUSION: We have concluded that energy efficiency standards to be implemented under the Energy Act apply to appliances designed and sold exclusively for use in mobile homes if those products are covered consumer products as discussed above

Associate General Counsel

Attachment

JUL 10 1979

P. Ann Lawhead, Acting Director
Policy Development and
Control Division, VPF

K. H. Sauerbrunn, Regulatory Programs Division, GR

Pawnee Cove Estates Addition
CILSR No. 2-02172-42-33

QUESTION: Does the proposed legal opinion regarding the reservation of oil, gas and other minerals at the Pawnee Cove Estates Addition, which is set forth in the January 31, 1979 letter from the developer's attorney, satisfy the requirements of Section 1710.11 of the CILSR Regulations?

ANSWER: The proposed legal opinion that under Oklahoma state law the reservation of oil, gas and mineral rights at the Pawnee Cove Estates Addition would be nugatory, may satisfy the requirements of Section 1710.11 of the CILSR Regulations. In order to qualify for exemption under Section 1710.11, the property must, inter alia, "be free of all liens, encumbrances and adverse claims at the time the purchaser signs the contract of sale or lease and continue to be free of liens, encumbrances and adverse claims until a deed is delivered to the purchaser." Although Section 1710.11(b)(2) permits reservations given for the purpose of bringing public services to the land being developed the instant reservation does not meet this exception to the general proscription set forth in Section 1710.11(b)(3). The developer would therefore have to submit a legal opinion demonstrating that the reservation of oil, gas, and mineral rights at the Pawnee Cove Estates Addition is not operative under Oklahoma state law.

DISCUSSION

The developer of the above named subdivision requested an exemption under Section 1710.11 of the CILSR Regulations on the basis of its Statement of Reservations, Restrictions, Taxes and Assessments. In a letter dated January 9, 1979, CILSR informed Mr. Joe Francis, attorney for the developer, that the Statement submitted did not meet the requirements of Section 1403(a)(10) of the Interstate Land Sales Full Disclosure Act because the developer's title evidence indicated that the subdivision is subject to a privately held reservation of an one-half interest of oil, gas and other minerals; and that this reservation would disqualify the subdivision if it carried the right of ingress and egress upon the property.

In response to OILSR's January 31, 1979 letter, Mr. Francis has offered to submit a legal opinion explaining that the subject reservation would be nullified under Oklahoma state law; and has requested that OILSR advise him of whether this opinion would satisfy Section 1710.11.

It is our belief that the General Counsel's Office should review the proposed legal opinion to determine whether the subject reservation is inoperative under Oklahoma state law. If this is the case, the reservation would be permissible under Section 1710.11. Nevertheless, the developer would still have to satisfy the other objections set forth in OILSR's January 9, 1979 letter in order to qualify for exemption under 24 C.F.R. 1710.11.

S/ JPK

Associate General Counsel

AUG 8 1979

Jane McGrew, General Counsel, Designate

K. H. Sauerbrunn, Regulatory Programs Division, GR

Investors Title Insurance Company
Raleigh, North Carolina
CA R-15

Paul Adams, Assistant Inspector General for Investigation, has requested that we review and evaluate a complaint filed with this Department by the North Carolina Land Title Association against designated title companies and their agents. (See attached memorandum) This complaint alleges violations of Section 8 (12 U.S.C. 2607) of the Real Estate Settlement Procedures Act (RESPA). This statute establishes criminal and civil sanctions against the compensated referral of business incident to a settlement service. The statute, however, provides the Federal government with authority to impose criminal sanctions only and it is in this context that the Office of Inspector General seeks our guidance.

This complaint presents this office with the first opportunity to analyse a burgeoning area of potential Section 8 violations. That area is generally referred to as "controlled business". This term is used to describe an arrangement whereby one settlement service provider is owned by one or more other settlement service providers who refer business to the owned-and in effect-captured entity. This matter is being brought to your attention because of its potentially far-reaching and controversial nature. The statute has been in effect for more than four years without any public application of its prohibitions to a controlled business situation. Corporate relationships have developed throughout the 1970's which would be adversely affected by this interpretation.

Although there never has been a formal evaluation of this issue by the General Counsel, it has been assumed by many in the industry (and some in the Department) that anything of value which took the form of a return on capital invested was not violative of Section 8. This position, which we believe is erroneous, was taken for essentially three reasons:

First, it was assumed that where stock dividends or partnership profit distributions were tied to the capital contributed and paid pursuant to standard accounting principles, rather than tied to the volume or value of business referred, no thing of value was present and no violation involved.

This was true regardless of the rate of return on capital. This argument is implied by the comments in Fact-Comment No. 10, Appendix B of Part 3500, Title 24, Code of Federal Regulations. Such an interpretation becomes unsupportable in the controlled business context. The statute (12 U.S.C. 2607(a)) and the term, "thing of value," as defined at 12 U.S.C. 2602(2) and 24 CFR 3500.14(b), are very broad and not limited by a required tie-in with the "volume or value of business referred." The only appearance of this phrase is in Section 3500.14(c) where it is provided that "[a] payment that is . . . connected in any way with the volume or value of business referred . . . is presumptively pursuant to an agreement or understanding." (Emphasis added.) Thus, this phrase is only applicable to an administratively-created presumption regarding the "agreement or understanding" element of the offense rather than a statutory limitation on the "thing of value" element. While the referral must be shown to have been induced by a thing of value, or expectancy of same, such a showing is easily made in almost all controlled business situations because of the very nature of the relationship.

Second, the legislative history did not address the controlled business situation. Rather, it is clear from the House report (H.R. Rpt. No. 177, 93rd Cong., 2d Sess. 7-8; Senate report contained substantially identical language) that the focus of Congress in enacting the Section 8 prohibitions was on the interaction between independent actors in the settlement process. Corporate tie-ins and stock ownership arrangements such as are typical in the controlled business problem were not considered. This was the result of the absence of discussion of such arrangements in the HUD/VA Report on Mortgage Settlement Costs (1972) on which Congress based its actions in this and other areas in RESPA. The economic discussion at pages 32 through 35 of that report refers only to such typically independent parties as attorneys, lenders, real estate agents and title companies paying each other referral fees. The absence of any discussion of controlled business is understandable in light of the relatively low frequency in 1971 of examples of controlled business. The subsequent enactment of Section 8, together with the changed economic and regulatory climate in which the settlement services industry operates, has resulted in a trend towards controlled business.

The failure of Congress to focus on the specific problems presented by the controlled business arrangement in the legislative process, however, is in no way limiting upon the application of the statute's prohibitions to today's problems. The courts have frequently upheld agency determinations that a given practice not specifically referred to in the relevant statute or its legislative history is nevertheless subject to the agency's enforcement or regulatory power where exclusion of the practice would render the statute less effective in accomplishing Congress' purpose in enacting the statute. F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968); Environmental Defense Fund v. Tennessee Valley Authority, 468 F. 2d 1164 (D. C. Cir. 1972); The courts have also applied the principle that remedial statutes are to be construed broadly to give effect to the underlying congressional purpose even where a statute contains both civil and criminal penalties. Securities and Exchange Commission v. Joiner, 320 U.S. 344 (1943); Securities and Exchange Commission v. Howey, 328 U.S. 293 (1946); Mourning v. Family Publications Service, 411 U.S. 356 (1973). Finally, where administrative agencies are given broad rulemaking authority (such as is arguably present in RESPA), the courts have sustained agency extensions of authority over practices not specifically addressed in the statute or its legislative history if such extensions are supported by the legislative purpose in enacting the statute. American Trucking Associations v. United States, 344 U.S. 298 (1953); Mourning v. Family Publications Service, supra.

The chief question in this area, therefore, is not whether the controlled business practice was specifically addressed in the legislative history of Section 8 but, rather, whether the application of its prohibitions to controlled business would be consistent with the Congressional purpose in enacting the provision. The legislative history is clear that it was Congress' purpose to eliminate the pecuniary interests of the referror from his/her consideration in making a referral. Better, cheaper, quicker service to the consumer and the opportunity to shop for such services were Congress' ultimate objectives in this area. Controlled business eliminates objectivity in referral and greatly lessens the opportunity to shop. It is clearly inconsistent with the Congressional purposes in this area and, under the above cited cases, may be appropriately addressed under Section 8.

Third, some corporate arrangements which would be adversely affected by an adoption of the controlled business rationale, are either expressly or impliedly permitted by other Federal agencies. See, for example, 12 CFR 545.9-1(a)(4)(ix) and (x) of the Federal Home Loan Bank Board's (FHLBB) regulations which expressly permit Federally-chartered savings associations to establish service corporations which provide title insurance and escrow services. Thus, an adoption of the controlled business rationale would apparently result in an inconsistency between Federal agency policies. The former Secretary raised this as her chief concern in this area.

Our reaction to this argument is as follows:

1. The proposed interpretation is not, essentially, in conflict with the FHLBB or any other Federal agency in that ownership is not prohibited under Section 8. Only compensated referral between settlement service providers is prohibited. Therefore, under Section 8, savings associations and bank holding companies may acquire affiliates which perform settlement services but would be prohibited from referring business to these controlled entities. Whether such investments would be attractive without access to an assured customer source is a different question not addressed here.

2. The FHLBB, acting through the Federal Savings and Loan Insurance Corporation, has already acknowledged one of the ills associated with this arrangement when it prohibited a savings association from conditioning

approval of the association's loans on the use of a particular title insurer. See 12 CFR 563.35(a).

3. Even if a conflict exists, such conflict addresses only the desirability of seeking prosecution in this class of cases, not whether the general practice of controlled business is or is not a violation. It is to be remembered that only a small portion of the potential applications of this interpretation would involve federally-chartered financial institutions' authorized ownership of settlement service providers. A failure to interpret Section 8 to address controlled business because of such a conflict, real or apparent, would result in arrangements like Investor's Title being allowed to continue and multiply.

4. It is not the intention of the program office to take any action without the prior consultation of other Federal agencies, such as the Department of Justice and the FHLBB. If program policy permits, these meetings may result in an exemption from the prohibitions of Section 8 for federally chartered entities which have such corporate interests, assuming a conflict exists which necessitates such action. See 12 U.S.C. §§2607(c)(4) and 2617(a) for exemption authority. If such an exemption is viewed as fundamentally inconsistent with the purposes of the statute, consulation may involve advocating a change in FHLBB policy in this area. That policy has often come under criticism for various reasons and a revision may be possible. For an example of such criticism, see Government Accounting Office, Savings and Loan Associations: Changes Needed in the Regulation of Their Service Corporations, 37 (1978) where the issue of competition by service corporations with independent members of such industries as title insurance and real estate sales is discussed.

Addressing the present case, the facts present an excellent example of controlled business and its inconsistency with the underlying policy of Section 8. A title insurance underwriter has established four corporate entities which operate throughout the State of North Carolina. Each of these entities is assigned to different categories of settlement business: secondary market lenders, other lenders, commercial/residential developers, and residential developers. The underwriter has sold preferred stock to lenders and developers only. The amount of shares and the entity in which an interest will be obtained depend upon the nature of the shareholder's business. The underwriter retains a controlling common stock interest in each of the four corporate entities.

The underwriter has established a service office in each of the state's population centers, with each such office representing and performing title-related services for all four corporate entities. These service offices (the only corporate offices which the four possess) receive all requests for title work and assign the work to the corporate entity in which the referror is a stockholder. The policy is issued by the shareholder's corporation, which is an issuing agent of the underwriter, although all actual work is performed by the service office. The profits of the corporation are distributed to shareholders according to standard accounting principles. Profits are derived by deducting the underwriting charge and a service fee from the gross premium. Each of the four corporate charters contains a liberal call provision which, it has been alleged, would be exercised if a stockholder failed to refer a certain minimum amount of business or would be exercised in part if one stockholder referred to his/her corporation a disproportionately large share of the entity's policy business. There are no known instances where this call provision has been exercised.

It has also been alleged that the underwriter has recently begun approaching real estate brokers as potential shareholders in a corporation which would be presumably established to encompass this employment group. The title insurance/real estate broker association is a typical one under Section 8 and may be the most effective referring group yet approached by the underwriters.

We are informed that many of the lender/shareholders have provided information to attorneys which misrepresents that a borrower prefers to do business with their controlled title insurance company. Others have allegedly required execution by borrowers of title company preference statements. Others have simply not accepted title binders from any other company. While these practices are not essential to a Section 8 violation, they do illustrate the negative consequences of controlled business and increase jury appeal.

We are also informed that Investor's Title began this practice some three years ago when it ranked approximately sixth among title insurers in North Carolina with between $200,000 and $300,000 in gross premiums earned. It is presently second with approximately one million dollars in premiums. We understand that a typical lender/shareholder who purchased the maximum 300 shares at $5.00 per share (total $1,500 investment) would receive approximately a 300% return in the first year alone. Such information is, again, not directly related to establishing an element of the offense but does make the fact situation potentially more attractive from a prosecutorial point of view.

It should be noted that the complainant has been in contact with this office both before and after the filing of this complaint and some of the above synopsis of the facts has been derived from those conversations rather than the complaint as received. Documentation touching upon some of those points has since been secured.

Applying the elements of a Section 8 offense to the above facts, a violation can be established. Dividends paid to individual stockholders, under the controlled business analysis, constitute a "thing of value." As previously noted, this had been the element which was difficult to establish under other interpretations of Section 8. Such payments should be a matter of either corporate or public record and, therefore, easily obtainable.

The existence of an agreement or understanding to refer business incident to a settlement service can be proved in one of several ways. Some of the written documentation might be sufficient to establish this element. More likely, a pattern or practice of referral may be shown for each stockholder and, pursuant to Section 3500.14(c), such pattern would establish the presumption that referrals were pursuant to an agreement or understanding. If such a pattern cannot be established, an agreement possibly may be inferred from the nature of the relationship itself. For example, a significant shareholder or a shareholder expecting a large return on investment has a clear interest in referring business to the entity in which the shareholder has an interest. Likewise, a title company's arrangement to sell stock only to firms or individuals in a position to refer may be sufficient to establish the agreement element with respect to the title company.

It is likely that the remaining elements are present. The issuance of a title insurance policy is an enumerated example of a "settlement service" as defined at 12 U.S.C. 2602(3). From the complaint it cannot be established that federally related mortgage loans (the jurisdictional phrase in RESPA) are present. Their presence, however, is very likely, due to the breadth of the definitions of this phrase (12 U.S.C. 2602(1); 24 CFR 3500.5(b)). Nonetheless, their presence must be established in every case.

Considerable industry interest exists regarding the controlled business issue and many potential participants in such arrangements as well as their competitors eagerly await some Departmental action. Any decision reached on this question within HUD should be reviewed and concurred in by the Department of Justice, either in the context of review of this case or their review of regulatory amendments in this area which the program office wishes to issue.

We will defer any advice to the Inspector General or the program office pending your reaction to our interpretation of this issue.

K. H. Sauert

Associate General Counsel

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Patricia M. Worthy
Acting Director, Lead-Based
Paint Poisoning Prevention Program

DATE: SEP 19 1979

IN REPLY REFER TO:

FROM : K. H. Sauerbrunn, Regulatory Programs Division

SUBJECT: Issues relating to the statutory language
of § 302 of the Lead-Based Paint Poisoning
Prevention Act (42 U.S.C. § 4822)

This is to supplement the legal opinion issued by our office to you on May 15, 1979. Since that time the following issues have been raised concerning the statutory language of § 302.

1. What is the meaning of the term "immediate hazard"?
2. What does the phrase "as far as practicable" mean?
3. Is there a different standard for lead-based paint removal in HUD-assisted housing built prior to 1950 and federally owned housing?

I. USE OF THE TERM "IMMEDIATE HAZARD" IN § 302

The Secretary has the discretion to define the term "immediate hazard." However, the legislative history of § 302 indicates that Congress intended the Secretary to include intact lead-based paint chewable surfaces rather than to limit the scope to cracking, scaling, peeling or loose lead-based paint.

As was pointed out in the May 15, 1979 legal opinion, the language of § 302 was changed as a result of City-Wide Coalition Against Childhood Lead-Based Paint Poisoning, et al. v. Philadelphia Housing Authority, HUD, et al., 356 F. Supp. 123 (E.D. Pa., 1973) (hereinafter referred to as City-Wide). Although the City-Wide case dealt primarily with HUD-owned housing, the changes in the statutory language of § 302 were not confined to HUD-owned housing. The procedures mandated apply to all HUD insured and assisted housing constructed prior to 1950.

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After City-Wide, Congress changed the statutory language that dealt with HUD-assisted housing built prior to 1950. The "cracking, scaling, peeling or loose" language was omitted entirely. If Congress intended to restrict the Secretary to the limited definition of "immediate hazard," the pre-1950 HUD-assisted housing provision of § 302 would have remained unchanged.

The 1973 Senate floor debate on § 302 also upholds the inclusion of chewable surfaces in the definition of "immediate hazard."

On May 9, 1973 the Senate considered the 1973 amendment to the Lead-Based Paint Poisoning Prevention Act. At that session Senator Schweiker described his amendment as requiring:

> [T]hat in certain housing sold or insured by the Federal Housing Administration, the property be inspected for lead-based paint to which children may be exposed and the hazard removed. (Cong. Rec., S. 14883, May 9, 1973) [Emphasis supplied.]

Senator Schweiker's statement coupled both FHA-insured and HUD-owned housing. In such housing, lead-based paint hazards "to which children may be exposed" must be removed.

Senator Kennedy stated in the floor debate:

> We need this legislation, because we know how to prevent lead-based paint poisoning. . .By removing lead from paint in surfaces accessible to young children, the hazards of lead-based paint poisoning are prevented. (Cong. Rec., S. 14881-2, May 9, 1973)

Senator Kennedy did not differentiate between HUD-assisted and federally owned housing. He spoke of "this legislation" and concentrated on lead-based paint surfaces accessible to children.

The legislative history of § 302 requires that the Secretary broaden the definition of "immediate hazard" as including at a minimum intact lead-based paint chewable surfaces.

II. USE OF THE PHRASE "AS FAR AS PRACTICABLE" IN § 302

Although the term "immediate hazard" in § 302 and the term "hazard" both include intact chewable surfaces, the phrase "as far as practicable" does require a different standard for HUD-assisted housing built prior to 1950.

Unfortunately, the legislative history of the 1973 amendment does not address the phrase "as far as practicable." However, this phrase was dealt with in S. 1664, the Lead-Based Paint Poisoning Prevention Act of 1975.[1] This bill contained a section which would have amended § 302 by striking out the words "as far as practicable."

That part of the hearings discussing the amendment to omit the phrase "as far as practicable" indicates that the amendment was abandoned as a result of a compromise reached between HUD and Senator Kennedy. This compromise called for a targeting of certain HUD-assisted housing on the part of HUD in its lead-based paint removal programs.

Senator Kennedy was concerned with the child who returns to a lead-contaminated environment after treatment in the hospital for lead poisoning:

> [C]hildren go right back to their homes and they come back again to the hospital because the homes still present a hazard to their health. (Hearings at p. 38)[2]

He explained that the omission of the phrase "as far as practicable" would allow HUD to put an end to this recurring cycle of lead poisoning.

In response, then Deputy Assistant Secretary Barfield of HUD advised Senator Kennedy at the hearing that if the phrase was taken out § 302 would be "so sweeping that it extends to include places where there are no children." (Hearings at p. 38)

Barfield seemed to imply that the phrase "as far as practicable" would allow HUD to concentrate on certain kinds of dilapidated housing and homes which contain children. He stated:

> In other words, with a limited amount of resources, we would like to concentrate our effort on places where there really is a need

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[1] Subcommittee on Health of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess., on S. 1664, Lead-Based Paint Poisoning Prevention Act of 1975 (July 16, 1975). (Hereinafter referred to as Hearings.)

[2] Ibid.

> to use Federal resources. . .Senator Kennedy, we have made the judgment on the kind of priority needed for those homes where they have children who have been identified as being lead sick. (Hearings at p. 38)

After the 1975 hearings HUD published revised regulations[3] implementing § 302 which discussed the meaning of "as far as practicable" in terms of eliminating cracking, scaling, chipping, peeling, or loose paint. However, the preamble stated that these regulations would be subject to continuing evaluation and review by HUD. HUD did not at that time discuss the possibility of developing a procedure of targeting specific types of HUD-assisted housing. Based upon the 1975 hearings, it is our opinion that we should reconsider the interpretation of "as far as practicable" to mean that the Department may concentrate its limited resources with regard to HUD-assisted housing, but at a minimum, where these resources are used, there should be lead-based paint removal from chewable surfaces.

Finally, in informal discussions with staff members of Senator Kennedy's office as to the meaning of the phrase "as far as practicable" in § 302, we are satisfied that their interpretation coincides with ours. They believe that the 1975 hearings allow the concentration of resources rather than across the board lead-based paint removal in all HUD-assisted housing. This concentration of resources, according to Senator Kennedy's staff, would be obtained via the health approach; that is, requiring lead-based paint removal from chewable surfaces in any HUD-assisted housing where a child is exposed to lead-based paint poisoning. A concentration on target areas where dilapidated housing exists could also bring about a similar result.

The exact approach that the Secretary would take with respect to HUD-assisted housing would depend on whether the Secretary chose to adopt the health approach or the target area approach. In either case, housing where children reside is intended to have priority.

III. HUD-ASSISTED HOUSING BUILT PRIOR TO 1950 VS. FEDERALLY OWNED HOUSING

As noted in the previous section, the term "as far as practicable" requires that in certain HUD-assisted housing the hazards of lead-based paint poisoning be eliminated. The Secretary has the discretion to decide to which type of housing

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[3] 41 Fed. Reg. 28876 (1976).

HUD will apply its resources. The language of § 302 does not leave room for such discretion, however, for federally owned housing.

The Secretary must require removal of lead-based paint poisoning hazards in all federally owned properties prior to sale when their use is intended for residential habitation. The legislative history cited above establishes a minimum standard for both pre-1950 HUD-assisted housing and federally owned housing which includes prevention of lead-based paint poisoning from both intact chewable surfaces and cracking, scaling, peeling, or loose paint surfaces.

CONCLUSION

The Secretary has the discretion to define the term "immediate hazard." The legislative history of § 302 requires that the Secretary include at a minimum prevention of poisoning from cracking, scaling, peeling, or loose lead-based paint and intact lead-based paint chewable surfaces for both HUD-assisted and federally owned housing.

The phrase "as far as practicable" gives the Secretary the discretion to determine in which types of assisted housing HUD should concentrate its resources for lead-based paint removal. Since with respect to federally owned housing no such discretion exists, lead-based paint hazards must be eliminated in all such housing.

K. H. Sauerbrunn
Associate General Counsel
for Regulatory Programs

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : K. H. Sauerbrunn, Associate General Counsel for Regulatory Programs

DATE: August 16, 1979

IN REPLY REFER TO:
GHH:HM:DFMartini
EXT. 57080

FROM : Robert F. Hollister

SUBJECT: Issues Relating to the Statutory Language of §302 of the Lead-Based Paint Poisoning Prevention Act (42 USC §4822)

Reference is made to your proposed memorandum to Patricia Worthy, Acting Director, Lead-Based Paint Poisoning Prevention Program, concerning the question of lead-based paint. In our opinion the memorandum omits an issue which must be covered.

Section II of the memorandum suggests that HUD has done nothing with respect to the lead-based paint problem since the 1975 hearings ("Since the 1975 hearings HUD has not implemented a procedure by which it could concentrate its resources in order to meet these objectives . . . . The exact approach that the Secretary would take with respect to HUD-assisted housing would depend on whether the Secretary chose to accept the health approach or the target area approach.")

In fact on June 25, 1975, HUD published a notice of revised regulations in the Federal Register, received written comments, conducted hearings, and conducted research projects through the National Bureau of Standards. On issuing revised regulations on July 13, 1976, the Secretary specifically referred to "immediate hazards," "as far as practicable," a "health approach" and the City-Wide case.

The memorandum should point out that these matters were considered after the 1975 hearings but the Secretary may reconsider them if deemed appropriate.

Assistant General Counsel
Home Mortgage Branch

Attachment

PREVIOUS EDITION IS OBSOLETE

MAY 1 5 1979

Rebecca Johnson, Director
LBPPP Division, VR

K. H. Sauerbrunn, Regulatory Programs Division, GR

Congressional Intent of §302 of the Lead-Based Paint Poisoning Prevention Act

QUESTION: Does §302 of the Lead-Based Paint Poisoning Prevention Act require HUD to remove lead-based paint from chewable surfaces in all HUD-assisted housing built prior to 1950 and in all HUD-owned housing prior to resale?

ANSWER: We conclude that §302 requires the removal of lead-based paint from chewable surfaces in all HUD-assisted housing built prior to 1950 and in all HUD-owned housing prior to resale.

I. BACKGROUND

We have been asked to review whether in §302 of the Lead-Based Paint Poisoning Prevention Act Congress intended for lead-based paint on chewable surfaces to be removed. Chewable surfaces is a broad term used to describe those surfaces readily accessible to children which might be used for the purpose of teething, such as door frames, windowsills and moldings.1/

1/ For various definitions of "chewable surfaces" compare New Hanover, N.C., Regulations for the Control of Childhood Lead Poisoning, §1-13 and Scott County, Iowa, Board of Health Regulations No. 106, §1(b).

I-13 "Chewable Surface" shall include but not be limited to such surfaces as windowsills, window frames, door frames, handrails, toys, furniture, food utensils and other appurtenances offering a biting surface to a child or other person.

(b) Chewable Surface shall include but not be limited to such surfaces as windowsills; window frames below the four (4) foot level and two (2) inches from all edges; door frames below the four (4) foot level and two (2) inches from all edges; stair rail spindles; stair treads from four (4) inches from lip on top of tread and lip to riser on bottom side; doors below the four (4) foot level and four (4) inches from all edges; stair rails; porch railings, toys, furniture, food utensils and other appurtenances offering a biting surface to a child or other persons.

Under present regulations lead-based paint is not required to be removed from chewable surfaces which do not contain chipping, peeling, cracking or loose paint.

The legislative history of the §302 amendment will be examined in light of its original and final versions. There will also be a discussion of the impact on this amendment by City-Wide Coalition Against Childhood Lead-Based Paint Poisoning, et al. v. Philadelphia Housing Authority, HUD, et al., 356 F.Supp. 123 (E.D. Pa. 1973) (hereinafter referred to as the City-Wide case), which dealt with a chewable surfaces incident in Philadelphia and was decided prior to the final revision of §302. Finally, there will be an examination of other statutes.

Section 302, P.L. 93-151, is a 1973 amendment to the Lead-Based Paint Poisoning Prevention Act. The background of the 1973 amendments is as follows:

On January 26, 1972, Senator Kennedy introduced into the 2nd session of the 92nd Congress a bill designated as S.3080. The purpose of this bill was to improve the procedures and increase the resources available under the provisions of the Lead-Based Paint Poisoning Prevention Act, P.L. 91-695. In the House, Congressmen Ryan and Barrett introduced similar legislation, but it was not enacted. During the 1st session of the 93rd Congress, Senator Kennedy presented S.607 which was identical to S.3080. For this reason, no hearings were held on S.607. At this session, Congressman Barrett and Congressman Rosenthal again introduced legislation (H.R. 2243 and H.R. 3006) into the House to amend the Act. The conferees ironed out only minor differences between the House and Senate versions, and amendments to the Lead-Based Paint Poisoning Prevention Act, P.L. 93-151, were enacted on November 9, 1973.

II. LEGISLATIVE HISTORY OF §302

Senator Schweiker proposed Section 302, which was entitled "FHA Requirements," as an amendment to S. 3080, the forerunner of P.L. 93-151.[2]

Senator Schweiker on the requirements of his amendment as originally written stated:

> Lead-based paint for interior house-hold use which contained very high percentages of lead compounds, at least 50 per cent in several cases, was in fairly wide use during the years before 1950. As a consequence, much housing in existence today which was constructed prior to 1950 is likely to contain paint with these very high levels of lead compounds. My pending amendment would require the Secretary

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[2] Cong. Rec., S. 9251, June 14, 1972, and P.L. 93-151; 87 Stat. 565.

> of Housing and Urban Development to establish procedures to minimize the hazards of lead-based paint poisoning when inspecting residential housing constructed prior to 1950 for which an application for mortgage insurance or housing assistance payments has been made to the Federal Government[3]

Referring to the implementation of the original Section 302 within the existing HUD framework, Senator Schweiker said:

> I have long been concerned with the need to provide a solution and an end to the very serious problem of lead paint poisoning. We should use every means available, and my amendment would incorporate into an existing HUD procedure the means to warn the buyer of the hazard of lead-based paint and remove the immediate danger before he moves into the house. (emphasis supplied.)[4]

The existing HUD procedure to which Senator Schweiker referred in the above statement is contained in 24 CFR 35 (F.R. Vol. 37, No. 205, October 21, 1972). These regulations required that applicable surfaces which contained health hazards would be rendered "tight", i.e., scraped, sanded, and repainted with two coats of non-lead based paint. (emphasis supplied.) See 24 CFR 35.18 (1972). Under the 1972 regulations the term health hazard was defined as "cracking, scaling, peeling and loose lead-based paint on applicable surfaces." 24 CFR 35.3(3) (1972).

Chewable surfaces were not classified as health hazards unless the lead paint surfaces were cracking, scaling, peeling or loose. Thus, under the existing HUD procedures at the time Senator Schweiker proposed his original version of Section 302, chewable surfaces were excluded from coverage of the Act.

The final version of Section 302 rejected the existing HUD procedure, i.e. treatment of cracking, scaling, peeling or loose lead paint and substituted "paint which may contain lead and to which children may be exposed".

The original version of Section 302 and the final version enacted into law are compared below. The original material is bracketed while the final language is capitalized:

> Sec. 302. The Secretary of Housing and Urban Development . . . shall establish procedures TO ELIMINATE AS FAR AS PRACTICABLE (to minimize) the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary. Such procedures shall apply to all such housing constructed prior to 1950

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[3] Ibid.

[4] Ibid.

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> and shall AS A MINIMUM provide for (1) appropriate measures to eliminate AS FAR AS PRACTICABLE (whenever feasible) immediate hazards due to the presence of (cracking, scaling, peeling, or loose) paint which may contain lead and to which children may be exposed, and (2) assure notification to purchasers AND TENANTS of such housing of the hazards of lead-based paint, of the symptoms and treatment of lead-based paint poisoning and of the importance and availability of maintenance and removal techniques for (minimizing or) eliminating such hazards. Such procedures may apply to housing constructed during or after 1950 if the Secretary determines, in his discretion, that such housing presents hazards of lead-based paint. THE SECRETARY MAY ESTABLISH SUCH OTHER PROCEDURES AS MAY BE APPROPRIATE TO CARRY OUT THE PURPOSES OF THIS SECTION. FURTHER, THE SECRETARY SHALL ESTABLISH AND IMPLEMENT PROCEDURES TO ELIMINATE THE HAZARDS OF LEAD-BASED PAINT POISONING IN ALL FEDERALLY OWNED PROPERTIES PRIOR TO THE SALE OF SUCH PROPERTIES WHEN THEIR USE IS INTENDED FOR RESIDENTIAL HABITATION . . .5/

The decision to strengthen the language originally contained in Section 302 stemmed from the court decision in the City-Wide case to issue a preliminary injunction against the sale of HUD-owned properties which did not comply with stricter city regulations concerning correction of lead-based painted surfaces. As a result of the injunction FHA activity in Philadelphia came to a virtual standstill, with the exception of ad hoc sales where purchasers certified that no children would reside in a dwelling containing excess lead levels.

The effect of the Court's decision was to disallow the less stringent HUD regulations regarding removal of lead-based paint in HUD-owned properties where a local ordinance held other property owners to the higher standard of removing all lead-based paint from any surface which could be chewed or ingested by children. The City-Wide decision involved one chewable surfaces case where a home was purchased from HUD and all painted surfaces were rendered "tight" in compliance with HUD pre-§302 regulations. The Court noted that even where applicable surfaces had been rendered tight in accordance with HUD regulations the hazard of lead paint on chewable surfaces remained. The court stated the facts of this case as follows:

> In October, 1970, Mrs. Page's small child became violently ill and was hospitalized. His condition was diagnosed as lead poisoning. Mrs. Page ascertained that the child had chewed on wooden window ledges in

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5/ Cong. Rec., S. 9251, June 13, 1972, and P.L. 93-151; 87 Stat. 565.

> her home. Had the lead-based paint been completely removed before repainting in accordance with City of Philadelphia Department of Public Health regulations, the child could not have ingested lead from chewing on the window ledges. *City-Wide* at 127.

With regard to abatement of the lead hazard, findings 15 and 16 specifically addressed the issue of total removal of lead-based paint from chewable surfaces versus HUD's policy of rendering surfaces "tight":

> 15. Children can become poisoned by eating lead-based paint and from chewing or "teething" on wood and other surfaces *even where the lead-based paint has been painted over and rendered tight in accordance with HUD regulations*. (emphasis supplied).
>
> 16. Expert testimony indicates that in about 22 percent of reported or suspected lead-based paint poisoning cases among children in Philadelphia the high blood-lead levels resulted or came about *in homes where the painted surfaces were "tight" as required by HUD regulations*. (emphasis supplied). *City-Wide* at 126.

The Court chastized HUD for its refusal to require compliance with the more stringent Philadelphia lead-based paint regulations stating:

> Cut to its bare bones, HUD contends that it should be permitted to continue to sell urban residential houses that it acquires despite the fact that the houses contain dangerous levels of lead-based paint accessible to small children, and despite the fact that the houses do not conform with City of Philadelphia, Department of Public Health regulations and are subject to condemnation by the Department of Public Health and unfit for human habitation, thereby subjecting the owners to fines and criminal penalties, without warning the purchasers of the situation--all because elimination of the hazard might cost an estimated high expenditure of $1,200 per house which might not be recouped on re-sale. HUD further seeks moral justification on the basis of a housing shortage for low-income families. To equate the admittedly real and grave danger of permanent brain damage to small children with the relatively modest additional cost of rehabilitating houses to free them from lead-based paint raises issues that no amount of rationalization or legal theory can justify on moral grounds. *City-Wide* at 130-131.

The City-Wide case (January 1973) appears to represent a turning point, after which sponsors of the §302 amendment to the Act no longer perceived its implementation to be "within the existing HUD framework". Less than a year after stating that the amendment would place no additional burden on HUD,[6] Senator Schweiker commented that the amendment requires that in certain housing sold or insured by the Federal Housing Administration, the property must be inspected for lead-based paint to which children may be exposed, and the hazard removed.[7] (emphasis supplied).

The importance of the City-Wide case in the evolvement of §302 is reflected in Senator Kennedy's statement during the hearings on the 1973 amendments:

> Last January, lawyers representing the Philadelphia coalition against childhood lead paint poisoning, presented statistics to a Federal judge showing 89 deaths in that city between 1950 and 1970, attributable to lead paint poisoning. Based on that data and other evidence U.S. District Judge Donald W. VanArtsdalen ruled that the danger to children from lead-based paint is immediate and continues each day that HUD sells a house. Thus, the judge ordered the removal of all lead-based paint in 1,200 federally owned residences in Philadelphia.[8]

Senator Kennedy's allusion to the City-Wide case evidences that case's effect on the final wording of the amendment. This conclusion is reenforced by the timing of the City-Wide decision which coincided with the period between the original and final version of the amendment. Further, HUD's own study "Improving HUD's Regulatory Strategy to Prevent Lead-Based Paint Poisoning" found that the "major impetus" for the 1973 amendments to the Act was the City-Wide case.[9]

The City-Wide case addressed the issue of lead-based paint requirements in HUD-owned houses. However, §302 deals not only with HUD-owned houses but also with HUD-assisted housing. The statute can be broken down as follows:

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[6] Cong. Rec., S. 9251, June 13, 1972.

[7] Cong. Rec., S. 8633, May 9, 1973.

[8] Cong. Rec., S. 8631, May 9, 1973.

[9] McKinsey & Company, Inc., Improving HUD's Regulatory Strategy to Prevent Lead-Based Paint Poisoning, U.S.D.H.U.D. (June 1978).

1. In all HUD-assisted housing built prior to 1950 the Secretary shall establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning. These procedures as a minimum provide for appropriate measures to eliminate as far as practicable immediate hazards due to the presence of paint which may contain lead and to which children may be exposed. Notice to purchasers and tenants of such housing as to the hazards of lead-based paint and the availability of techniques for the removal of such paint is also required.[10]

2. In HUD-assisted housing built after 1950, the Secretary may apply the above procedures. Thus the Secretary has the discretion whether or not to apply the above procedures in HUD-assisted housing built after 1950.

3. In all federally owned housing, the Secretary shall eliminate the hazards of lead-based paint poisoning.

HUD regulations implementing §302 were published in 1976. These regulations give requirements for HUD-assisted housing at 24 CFR 35.24 and federally owned housing at 24 CFR 35.54. The term "health hazard" used in the 1972 regulations implemented prior to the §302 amendment has been replaced by the terms "potential hazard" and "immediate hazard". Although there are two definitional sections for those terms (§35.3, 35.54), both HUD-assisted and HUD-owned housing employ identical definitions. Thus, "potential hazard" and "immediate hazard" are each defined in terms of paint which *may* contain lead and which is *cracking, scaling, chipping, peeling or loose*. (emphasis supplied.) Such a definition rules out the facts of the *City-Wide* case since there the surface was not scaling, chipping, peeling or loose although it was rendered tight in accordance with HUD regulations.

The term "potential hazard" could encompass chewable surfaces since it is defined as "paint (which may contain lead) on applicable surfaces which are in a sound tight condition but which may become an immediate hazard. . . by reason of cracking, scaling, chipping, peeling or loosening." 24 CFR 35.3(h). However, there is no abatement requirement for a potential hazard. Thus, if the chewable surface does not become an immediate hazard, there is no requirement to remove the paint which may contain lead. Further, the procedure to eliminate "immediate hazards" both for

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[10] Although it could be argued that the phrase "as far as practicable" in this section excludes chewable surfaces as an immediate hazard in HUD-assisted housing built prior to 1950, use of the phrase "to which children may be exposed" necessitates the inclusion of chewable surfaces as an immediate hazard. Part 3 of §302 dealing with HUD-owned housing does not contain the phrase "as far as practicable" and thus is not open to such interpretation.

HUD-assisted housing (24 CFR 35.24) and HUD-owned housing (24 CFR 35.56 (a)(2)) only requires that the surfaces be sanded and repainted with nonlead-based paint. There is no requirement for complete removal of the paint unless the paint film integrity of the peeling surface cannot be maintained. Under HUD's present regulations, the danger of lead poisoning because of non-removal of lead-based paint from chewable surfaces still exists. Since HUD's present abatement procedure is premised on peeling paint which may contain lead as opposed to paint which has been detected as lead-based, there is no way of correcting the danger to children presented by intact chewable surfaces which contain lead paint. Further, HUD's abatement procedure is in direct contradiction to the City-Wide case where HUD's procedure of rendering surfaces "tight" was rejected by the court.

Finally, the legislative history of the Act establishes that the purpose of the 1973 amendments including §302 is to broaden the scope of the Lead-Based Paint Poisoning Prevention Act. Senate Report No. 93-130 stated that the purpose of S. 607 "is to extend the provisions of the Lead-Based Paint Poisoning Prevention Act, P.L. 91-695, and to improve the procedures and to increase the resources available to achieve that goal"[11] (emphasis supplied). The summary section of the Senate Report states:

> "The Act is designed to eliminate the hazards caused by existing lead-based paint . . . The Committee therefore directs the relevant agencies of the Federal Government to implement the provisions of the Committee's bill as promptly and thoroughly as possible.[12]

The section-by-section summary of the Act states that §302 authorizes the Secretary of HUD to establish procedures to eliminate the hazards of lead poisoning in housing covered by HUD mortgage assistance or HUD housing assistance payments in housing constructed prior to 1950.[13]

A. Other Lead Based Paint Statutes

In reviewing the legislative history of §302 other lead based paint statutes in effect at the time the amendment was enacted should be examined. This is based on the fact that Congress was aware of similar statutes when they enacted §302. This is substantiated by the Congressional debate on the 1973 amendments. At the September 5, 1973 session, Congressman Barrett stated, "Philadelphia has been working hard on this. Philadelphia would like to be the model for all the other cities in cleaning up these conditions."[14] Further, as early as 1972 Senator Javits introduced a copy of New York City's lead poisoning control budget into the Record to show the need for further federal funding of the city's lead poisoning program. This budget noted the expected increase in the cost of housing due to the anticipated use of lead detecting instruments in lead hazard abatement.[15]

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[11] 1973 U.S. Cong. Adm. News 2403.

[12] Ibid at 2411.

[13] Ibid at 2413.

[14] Cong. Rec., H.R. 8920, Sept. 5, 1973.

Both the New York City and Philadelphia lead-paint poisoning programs require chewable surfaces containing lead to be treated for complete lead removal.[16] The New York law was passed in 1970 and the Philadelphia law was passed in 1966. Since the dates on the 1973 amendments reveal that Congress was aware of both these laws, §302's use of the phrase "eliminate as far as practicable" was written with an awareness of the New York and Philadelphia lead programs. New York and Philadelphia require either complete removal of lead paint on chewable surfaces or covering of the surface with a suitable material.[17] HUD's own regulations, however, only require sanding of the peeling surface and repainting with two coats of nonlead-based paint. Although New York and Philadelphia's methods of lead hazard abatement are costlier than HUD's present lead paint removal program, the legislative history of the 1973 amendment establishes that the high cost of lead removal was known to the sponsors of the Bill. At the June 14, 1972 floor debate on S. 3080, Sen. Kennedy noted "[F]or less than $1,000, the hazards of this disease can be eliminated for that child."[18] A final illustration of the legislative history favoring expansion of HUD's procedures under the 1973 amendments to the Act is contained in the September 5, 1973 House floor debate on those amendments. At that session, Congressman Koch described the Federal government's responsibility for eliminating lead paint poisoning in children as follows:[19]

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[15] Title II - Housing Rehabilitation

> It is estimated that with the expanded screening program, the Bureau of Lead Poisoning Control will request the Emergency Repair Program to execute repairs in 2,850 dwelling units. The current average cost is $450.00 per dwelling unit. However, it is anticipated that lead detecting instruments will be introduced and significantly increase the number of violations found per unit inspected. This will result in a corresponding increase in repair costs. The average cost per unit repaired will increase to $1,263.00. The total cost will be $1,263 x 2,850 = $3,599,550. Seventy-five percent of this expense of $2,699,663 is requested under Title II of the legislation. Cong. Rec. S. 3080, June 14, 1972.

[16] 'A paint condition conducive to lead posioning' means paint or plaster containing lead in a condition accessible for ingestion or where peeling or chipping of the paint or plaster is likely to occur. N.Y. Public Health Law §1370 (McKinney Supp. 1977).

Lead based coating shall be completely removed from any surface which can be chewed or ingested by children. Cracked, chipped, blistered or peeling lead based coating shall be completely removed. Phil., Pa., Regulations Relating to Labeling Application and Removal of Lead Paint, No. 5.

[17] Repainting a surface with a non-leaded paint without complete removal of the existing lead paint shall not be deemed to be satisfactory compliance (Specification for the Removal of Lead Paint issued pursuant to Regulations Relating to Labeling, Application and Removal of Lead Paint, Philadelphia, Pa.)

Repainting a surface with nonlead paint without the complete removal of existing lead paint to a height of at least four feet on surfaces which can be chewed or eaten shall not be deemed to be satisfactory compliance with section 1373 of the Public Health Law. Admin. Rules and Reg. of N. Y. Chapt. II, §67.7(c).

> On the one hand we say to the people of this country — the poor — we are not going to build adequate housing for you; we are not going to provide the millions of dollars necessary to create safe and habitable housing. On the other hand we also say to them we are not going to do anything about the substandard miserable houses and apartments that they are presently living in. We are not going to help make them safer. We are going to continue to let their children suffer the effects of lead poisoning. That is not reasonable. That is not compassionate. That is not humane. That does not enhance the reputation of this House. (emphasis supplied.)

III. COST RAMIFICATIONS OF AMENDING LEAD-BASED PAINT REGULATIONS

Although the mandate of the Act requires amendment of the current HUD lead based paint regulations, the cost ramifications of such action should not be ignored. Under HUD's present method of lead abatement, the low cost of removing and repainting peeling paint which may contain lead does not affect the overall cost of providing housing to low and moderate income families. However, once HUD requires the removal of lead paint from intact chewable surfaces, the higher cost of this method of abatement must affect certain aspects of HUD-owned and HUD-assisted housing. For a study of the cost differentials between HUD's present method of lead abatement and the higher cost of lead paint removal, *See* U. S. Department of Housing and Urban Development report, *Lead Based Paint Poisoning Research, Review and Evaluation 1971-1977*, July 1978.

IV. CONCLUSION

In conclusion, based on the legislative history of §302, the Congressional intent was to broaden the application of the Act. By keeping the regulations substantially the same as those enacted prior to §302 the purpose of the 1973 amendments has not been followed. The narrow interpretation of immediate hazard as "paint which may contain lead which is cracking, scaling, chipping, peeling or loose," (24 CFR 35.3(i) 35.54(f) is in direct contradiction to the City-Wide case as it excludes the danger of lead-based paint on intact chewable surfaces. This conclusion is reinforced by noting the effect of the City-Wide case on the final version of §302 which intentionally excluded the words "cracking, scaling, peeling or loose" and substituted the broader phrase "immediate hazards due to the presence of paint."

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[18] Cong. Rec., S.3080, June 14, 1972.

[19] Cong. Rec., H.R. 8920, September 5, 1973.

The legislative history of the 1973 amendments indicates the impact of municipal legislation, which required removal of lead-based paint from chewable surfaces, on §302. Finally, where a danger of lead poisoning still exists as in the facts of the City-Wide case, HUD has not followed the mandate of the Act to eliminate the hazards of lead poisoning.

V. RECOMMENDATION

Because we find that HUD regulations do not satisfy the mandate of §302, and because these regulations open HUD to the possibility of City-Wide type litigation, we recommend that HUD amend its current lead-based paint regulations to include chewable lead paint surfaces accessible to children in the definition of immediate hazard. Correction of the chewable surfaces hazard should be required by complete removal of lead paint in accordance with methods that are demonstrably effective.

Associate General Counsel

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Patricia Worthy, Deputy Assistant Secretary for Regulatory Functions, VR

DATE: AUG 14 1979

IN REPLY REFER TO:

FROM : K. H. Sauerbrunn, Regulatory Programs Division, GR

SUBJECT: Outline of HUD Responsibility to Promulgate Regulations Pursuant to 42 U.S.C. §6831 _et seq_, Title III of the Energy Conservation and Production Act (Hereinafter Referred to as the "Energy Act")

This memorandum was prepared at the request of Aubrey Edwards on August 1, 1979. Pursuant to the Energy Act the Secretary of HUD (hereinafter referred to as "Secretary") must develop regulations concerning the following matters:

1. A state may certify that it or some local government has adopted and is implementing a building code which meets or exceeds the requirements of the performance standards. The state must certify "in accordance with regulations of the Secretary." 42 U.S.C. §6834(a)(1). Regulations governing procedures for review of certifications are also necessary. See the last paragraph of 42 U.S.C. §6834(a).

2. The Energy Act establishes an "approval process" and gives the Secretary overall responsibilty for its effective application. 42 U.S.C. §6834(b). The approval process is a mechanism and procedure for the approval of the construction of a new building. The Secretary is to specify the level and agency of local or state government which is to administer the process. The purpose of the process is to determine whether a proposed building would comply with the performance standards.

3. The Secretary must establish a procedure for determining, at the request of a state, whether a "new building is located in any area in which the construction of new buildings is not of a magnitude to warrant the costs of implementing final performance standards." 42 U.S.C. §6834(a)(3).

4. The Secretary must establish procedural regulations for the conduct of investigations to determine the accuracy of state certifications. Some sort of hearing procedure is necessary before the Secretary may reject, disapprove or require the withdrawal of a certification. See the last paragrah of 42 U.S.C. §6834(a).

5. The statutory sanction is provided in 42 U.S.C. §6834(a): "No Federal financial assistance shall be made available or approved with respect to the construction of any new commercial or residential building in any area of any State, unless. . . ." If Congress approves the use of the sanction then it "shall thereafter be enforced, directly and indirectly, by each applicable person and governmental entity." 42 U.S.C. §6834(c). Regulations for the implemention of this sanction are necessary.

6. The Energy Act provides for grants to states and local governments. 42 U.S.C. §6836. Regulations are necessary in order to administer the grant program.

7. The Energy Act provides for technical assistance to the states and local governments. 42 U.S.C. §6837. Regulations with respect to the implementation of a technical assistance program are necessary.

8. The Secretary may want regulations for procedures whereby HUD will monitor the progress of the states and the local governments. Monitoring is required by 42 U.S.C. §6840(1).

The Energy Act provides no explicit time table for the promulgation of these regulations. However, in order to make the whole process run smoothly, they must be published in final form no later than the date on which the standards are published in final form. Pursuant to 42 U.S.C. §6833(a)(1) the final performance standards are to be published by February 14, 1980.

Finally, it is worth noting that the Secretary is required by 42 U.S.C. §6840(4) to report semiannually to Congress.

Associate General Counsel

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

JUL 20 1979

IN REPLY REFER TO:

EMORANDUM TO: John W. Kopecky
Associate General Counsel
for Insured Housing

FROM: K. H. Sauerbrunn

SUBJECT: Access by HUD-Approved Counseling Agencies
to Financial Records Through the
Right to Financial Privacy Act

INTRODUCTION

This memorandum is written in response to your June 12, 1979 request for a legal opinion concerning the issue of whether HUD-approved counseling agencies are agents of the Department for purposes of obtaining financial information rom mortgagees pursuant to Section 1113(h) of the Right to Financial Privacy Act.

We have reviewed this Act, HUD's handbook requirements pertaining to approved counseling agencies, and the relevant case law, and are of the opinion that a HUD-approved counseling agency is not an agent of the Department; therefore, a counseling agency is not a "Government authority" for purposes of obtaining financial records under the Section 1113(h) exception to the Right to Financial Privacy Act.

BACKGROUND

1. Right to Financial Privacy Act. The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 *et seq*. (Title XI of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, P.L. 95-630, 92 Stat. 3641), prohibits access by a Government authority to the financial records of any customer of a financial institution unless those records are obtained through one of five methods prescribed by the Act or through one of the Act's exceptions provided in Section 1113. Only a "Government authority" may obtain financial records through one of these methods or exceptions. The Act defines Government authority as "any agency or department of the United States, or any officer, employee, or agent thereof." Section 1101(3). [Emphasis added.]

The five accepted methods for a Government authority to gain access to a customer's financial records, Sections 1104-1108 of the Right to Financial Privacy Act, are not applicable to counseling agencies. However, if HUD-approved agencies are agents of the Department for purposes of meeting the Section 1101(3) definition of Government authority, they may obtain financial records through the loan insurance exception found at Section 1113(h)(1)(B) of the Act.

Section 1113(h)(1)(B) provides:

> (h)(1) Nothing in this title shall apply when financial records are sought by a Government authority --
>
> (B) in connection with the authority's consideration or administration of assistance to the customer in the form of a Government loan, loan guaranty, or loan insurance program.

This exception would permit HUD access to a mortgagor's financial records for the consideration and administration of FHA-insured mortgages. 124 Cong. Rec. 11730 (daily ed. October 5, 1978). We must therefore determine whether these HUD-approved counseling agencies are agents of the Department or whether they operate as independent contractors.

2. The role of HUD-approved counseling agencies. The National Housing Act, as amended by Sections 101(a) and 102(a) of the Housing and Urban Development Act of 1968, authorizes the Secretary to provide or contract with public or private organizations to provide budget, debt management, and related counseling services to mortgagors whose mortgages are insured under Sections 235 and 237 of the National Housing Act. In addition, Section 811 of the Housing and Community Development Act of 1974 and Title I of the Housing and Urban Development Act of 1968 add other counseling provisions. Housing counseling programs are designed to assist low- and moderate-income housing consumers to develop competence and responsibility in meeting their housing needs and to prevent defaults and avoid foreclosures in single- and multi-family HUD-insured and HUD-assisted housing programs. See HUD Housing Counseling Handbook 7610.1 Rev., Paragraph 2.

The Department has established an approval process whereby it certifies public and private counseling agencies which then provide consumers with necessary counseling services. HUD reviews an agency's qualifications by examining the professional experience of the agency's staff, its counseling facilities, accessibility of counseling, and agency liaison with community resources. If found to be acceptable, the Department enters into an agreement with the agency. According to Mr. O. Thomas Miles, Chief of HUD's Housing Counseling Branch, the Department has currently approved approximately 600 of these counseling agencies. The terms of the agreement are set forth in either HUD Form 9901 or 9913, depending on the extent of services provided by the agency. The agreements are signed by both parties but do not constitute a contract since there is no consideration. The agencies are generally nonprofit organizations which provide this assistance as a community service. HUD offers training to the approved agencies and monitors their performance. The agreements may be terminated at the will of either party. The requirements applicable to HUD-approved counseling agencies are more fully set forth in the HUD Housing Counseling Handbook and HUD Counselors/Housing Management Representatives Handbook, 7610.1 Rev., and 7610.4, respectively.

The Department does award grants to qualified approved counseling agencies. In this fiscal year, 302 of the 600 HUD-approved agencies are receiving grants totaling approximately nine million dollars. The parties sign a contract, Standard Form 26 (7-66), which sets forth the terms and conditions of the award.

The agencies provide their own facilities and staff. While the agencies may call upon Government Technical Monitors in our Area Offices for assistance, the day-to-day supervision and responsibility for the manner and methods of counseling provided to consumers are left to the professional judgment of the agency's staff. The counseling agencies are paid on a per-unit basis. Each contact with the consumer or the consumer's mortgagee, landlord, or creditor which results in identifying, clarifying, or resolving the consumer's housing problem, constitutes a unit. Terms and Conditions, Article II.B. The agency is then paid $16 per unit. Grants are awarded for a 13-month period.

In accepting this grant, the counseling agencies agree to attend Department training sessions, maintain acceptable record-keeping systems, and submit to monitoring and inspection by a Government Technical Representative from our central office. Counseling agencies must file monthly activity reports and a final report at the end of the grant period. Failure to comply with the terms of the grant may result in termination of the award.

The issue, then, is whether the relationship between the counseling agency and HUD places the counseling agency in the position of an agent or an independent contractor. If the agency is determined to be an independent contractor it may not avail itself of the Section 1113(h)(1)(B) exception to the Right to Financial Privacy Act in obtaining a mortgagor's financial records. An analysis of the relevant case law follows.

THE LAW OF AGENCY

As the Supreme Court noted in National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 121 (1944), "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." This issue concerning the status of HUD-approved counseling agencies is no exception. The difficulty arises in affixing some legal standard to the responsibilities of agents and independent contractors which can then be applied as a failsafe litmus test. No simple, uniform, and easily applicable test exists. United States v. Silk, 331 U.S. 704, 713 (1947). Rather, "it is the total situation that controls." Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

Characteristics which distinguish agents and independent contractors

It is a well established principle of agency law that an agent acts for and on behalf of his principal and is subject to the principal's control. Restatement 2d Agency § 1. See also N.L.R.B. v. United Brotherhood of Carpenters and Joiners of America, Local No. 1913 AFL/CIO, 531 F.2d 424, 426 (9th Cir. 1976).

a. HUD-approved counseling agencies do not act primarily for the benefit of the Department.

While approved counseling agencies do provide services on behalf of the Department, they primarily act for the benefit of the customer/mortgagor. This fact is clearly illustrated in HUD Housing Counseling Handbook 7610.1 in the provision which describes the objectives and purposes of the housing counseling program. Ten purposes are set forth in Paragraph 2 of the Handbook; only one is for the benefit of the Department, the other nine on behalf of the customer/mortgagor. See Restatement 2d Agency § 13 Comment b, which states that the agent must act primarily for the benefit of the principal. Failure to act generally for the benefit of the principal distinguishes the agency relationship from that of other relations.

b. HUD-approved counseling agencies are not subject to the control of the Department.

The most important characteristic which distinguishes independent contractors from agents is that of control, both of the physical conduct and of the performance of the actor. HUD-approved counseling agencies must enter into agreements with the Department. They accept grant awards on the condition that they meet certain basic qualifications, receive training, record their transactions, file reports, submit to periodic inspection, and follow the requirements set forth in HUD Handbooks on the subject of housing counseling. Do these terms and conditions of award constitute control?

A critical element in distinguishing an agency from a contractor is the power of the Federal Government "to control the detailed physical performance of the contractor." Logue v. United States, 412 U.S. 521, 528 (1973). In Logue the Supreme Court held that employees of a county jail that housed Federal prisoners pursuant to a contract with the Federal Bureau of Prisons were not Federal employees; therefore the United States was not liable for their torts. Although the contract required the county jail to comply with the Bureau's rules and regulations, and although the United States reserved rights of inspection to determine compliance, the contract did not authorize the United States to physically supervise the jail's employees. While the United States could compel compliance with Federal standards, it did not supervise operations. On that basis the county jail was determined to be a contractor and not an employee of the United States. See also Maryland v. United States, 381 U.S. 41 (1965).

Another case, with a similar fact pattern to ours, is United States v. Orleans, 425 U.S. 807 (1976). There, employees of a nonprofit community action agency entirely funded by the Office of Economic Opportunity were determined not to be employees of the United States for purposes of liability under the Federal Tort Claims Act. The community action agency was subject to OEO's rules and regulations. Nevertheless, the court held the agency to be an independent contractor. "Although such regulations are aimed at assuring compliance with goals, the regulations do not convert acts of entrepreneurs -- or of state government bodies -- into federal governmental acts." Id at 816. Cf. Jackson v.

Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). This case ultimately turned on the fact that OEO did not supervise the day-to-day activities of the community agency; therefore it did not exercise control over that agency. As Chief Justice Burger notes:

> Of course since the community action agencies receive federal funding, they must comply with extensive regulations which include employment policies and procedures, lobbying limitations, accounting and inspection procedures, expenditure limitations, and programmatic limitations and application procedures. The EOE also issues numerous guidelines. These regulations and guidelines attempt to assure that the federal money is spent for the benefit of the poor. The regulations do not give the OEO power to supervise the daily operations of a community action agency or a neighborhood program. Id at 817-818.

See also Hughes v. United States, 383 F. Supp. 1071 (S.D. Iowa 1973); Harris v. United States, 424 F. Supp. 627 (D. Mass. 1976), wherein the court held that an area manager broker was an independent contractor with respect to its relations with HUD.

These cases illustrate the point that regulating compliance and setting standards for HUD-approved counseling agencies do not constitute control for purposes of establishing an agency relationship. Courts look to the day-to-day supervision of the contractor in determining control. As noted by Mr. Miles, Chief of the Department's Housing Counseling Branch, HUD does not direct the manner or methods of assistance to be provided to customers. Those decisions are left to the professional judgment of the agency's supervisors. While HUD is available to offer such assistance if requested, Mr. Miles states that our role is one of compliance, to see that the customers receive the necessary counseling services. Thus, a critical element in determining an agency relationship, that of control, is lacking. For this reason, counseling agencies must be presumed to be independent contractors.

c. Other tests used by courts to determine an agency relationship.

A series of cases involving statutes relating to Federal withholding, social security, and unemployment taxes addresses the issue of agent versus contractor by examining common law definitions of agency relationships. These cases provide a checklist of agency characteristics. Many factors enter into that common law definition including "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required. . ." *United States* v. *Silk*, 531 U.S. 704, 716 (1947). Similar characteristics were cited by the Supreme Court that same year, in the case of *Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

In *Avis Rent-A-Car Systems, Inc.* v. *United States*, 503 F.2d 423 (2nd Cir. 1974), Judge Hays culled from *Silk* and *Bartels* a seven-point test for determining agency relationships. Although this list is not exhaustive, it does provide us with a meaningful basis for our determination:

> 1) If the person receiving the benefit of a service has the right to control the manner in which the service is performed, the person rendering the service may be an employee.
>
> 2) If a person rendering a service has a substantial investment in his own tools or equipment, he may be an independent contractor.
>
> 3) If a person performing a service undertakes a substantial cost, say by employing and paying his own laborers, he may be an independent contractor.
>
> 4) If a person performing a service has an opportunity to profit depending on his management skill, he may be an independent contractor.
>
> 5) If a service rendered requires a special skill, the person rendering it may be an independent contractor.
>
> 6) If the relationship between a person rendering a service and the person receiving it is permanent, it may be an employment relationship.
>
> 7) If a person rendering a service works in the course of the recipient's business, rather than in some ancillary capacity, he may be an employee. *Id* at 429. [Footnote omitted.]

These factors indicate that HUD-approved counseling agencies operate as independent contractors. For example: (1) As stated in the previous subsection, the right to control the manner in which these agencies perform their services are left to the discretion of the agencies. (2) The issue of investment in tools and equipment is not necessarily applicable to our fact situation; nevertheless the agencies perform these counseling services in their own offices and use their own facilities. (3) Counseling agencies pay their own employees. (4) Counseling agencies profit from their own management skills. The more personal contact made by the agencies with consumers, mortgagees, creditors, and credit reporting services, which results in resolution of the consumer's housing problem, the more units may be charged to the agency. The agency's professional skills directly affect its fee schedule. (5) Counseling requires special skills. The Department requires the director of each agency to have a "substantial background and/or training" in work with persons from a variety of ethnic and socioeconomic backgrounds. The director must have at least a year of experience and a year of training, and each counselor must have at least a year of combined professional training and experience. HUD Counseling Handbook 7610.1, Paragraph 18b. (6) The relationship between HUD and the agency is not permanent. Grants are awarded yearly, and counseling agreements may be terminated at the will of either party. (7) Counseling agencies generally work in some ancillary capacity. According to Mr. Miles, HUD-approved counseling agencies are PHA's, local chapters of the National Urban League, professional credit agencies, community betterment agencies, and religious and charitable organizations. He stated that counseling is only a small part of the total services offered by these agencies. In addition, it should be noted that counseling agencies do not receive salaries from HUD or even a set pay schedule. Rather, payment is made on a per-unit, piecemeal basis, depending on the nature of the service performed. All of these factors support our opinion that HUD-approved counseling agencies occupy the status of independent contractors in their relations with HUD.

COUNSELING AGENCIES MAY STILL ACQUIRE CONSUMER FINANCIAL RECORDS

Although not HUD's agents for purposes of obtaining financial records through the Section 1113(h)(1)(B) exception to the Right to Financial Privacy Act, counseling agencies may still obtain these records. The first and most obvious method is by customer authorization. Mr. Miles indicated that as a rule mortgagors are receptive to the idea of counseling. They should therefore be encouraged to permit counseling agencies' access to this information. A procedure similar to that found in Section 1104 of the Right to Financial Privacy Act should be established. In that way, authorization would be limited to a specific period of time; the authorization could be revoked at the will of the customer; and the counseling agency would be required to specify which records and for what purpose said records were needed.

Another method for permitting counseling agencies to have access to these records may be found in Section 1113(h)(4)(B) of the Right to Financial Privacy Act. This section permits a Governing authority (HUD) to transfer a customer's financial records to another if the transfer is necessary to "process, service or foreclose" the loan. Clearly, counseling is a form of servicing, and, if this information is vital to the counseling agency in curing a default or preventing foreclosure, the Department may transfer this information to the agency.

The Department now makes use of HUD Form 9903, entitled Authorization for HUD-Approved Counseling Agency to Receive Credit Report. This form is signed by the consumer for the purpose of notifying the mortgagee that the consumer has authorized release of his credit report to the counseling agency. This form could be expanded to permit additional financial records to be released to the counseling agencies.

At present, portions of Section 235 assistance and the Section 237 mortgage insurance program require counseling as a condition of mortgagor participation in these programs. An additional term for participation could be imposed requiring mortgagors to authorize release of their financial records to counseling agencies as a condition precedent to their obtaining FHA mortgage insurance. Mortgagees would be held harmless for the release of these records, to further encourage mortgagee cooperation.

Finally, HUD Handbook 7610.1, Paragraph 17, states that when the HUD Area Office informs the mortgagee that counseling is indicated, "the mortgagee shall submit to the counseling agency a copy [of all relevant financial information]." This practice should be expanded.

It is our opinion that customer authorization along the lines outlined in Section 1104 of the Right to Financial Privacy Act and use of the transfer authority found in Section 1113(h)(4)(B) offer the best means to assure that counseling agencies will receive this valuable information.

CONCLUSION

HUD-approved counseling agencies do not act primarily for the benefit of the Department nor are they subject to HUD's control in the performance of their services. For these reasons, they are presumed to be independent contractors rather than agents of the Department. As independent contractors they do not qualify as a Government authority, pursuant to Section 1101(3) of the Right to Financial Privacy Act, and therefore may not obtain customer financial records through the Section 1113(h)(1)(B) exception to the Act. Nevertheless, alternatives do exist which permit HUD-approved counseling agencies to have access to this information.

K. H. Sauer

K. H. Sauerbrunn
Associate General Counsel
for Regulatory Programs

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

AUG 23 1979

IN REPLY REFER TO:

MEMORANDUM TO: Charles L. Dempsey
Inspector General, Z

FROM: K. H. Sauerbrunn
Regulatory Programs Division, GR

SUBJECT: Impact of FOIA and Privacy Act on release of OIG investigation to Subcommittee on Investigations of the House Committee on Post Office and Civil Service

Introduction

This memorandum addresses your recent request for a legal opinion as to whether the Freedom of Information Act (FOIA) and the Privacy Act have any impact on the release of information by HUD to Chairman James M. Hanley of the Subcommittee on Investigations of the House Committee on Post Office and Civil Service. Chairman Hanley had requested information concerning the alleged sexual harassment of HUD employees by fellow employees. Acting Secretary Janis responded to this request by stating, *inter alia*, that the Office of Inspector General had just completed one investigation into this matter and was in the process of investigating a second matter. There now is concern that Chairman Hanley may request more specific information, including names and results of the Office of Inspector General's investigations.

Following review of the Acts, their legislative history, and applicable law, we have concluded that neither Act impairs the release of any information which might be requested by Chairman Hanley.

The FOIA does not prevent the release of information to Chairman Hanley.

The FOIA, 5 U.S.C. § 552, primarily was enacted to increase public access to governmental records. *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir., 1971). In interpreting this or any Act, however, the starting point is the language itself. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723

(1975). Where the language is plain, clear, and unambiguous, the courts must enforce the Act according to its terms. Caminetti v. U.S., 242 U.S. 470 (1917); 2A Sutherland Statutory Construction, § 46.01.

Turning directly to the Act, it provides that: ". . . This section is not authority to withhold information from Congress." 5 U.S.C. § 552(c). Accordingly, the information which Chairman Hanley requests in his capacity as Chairman of the Subcommittee on Investigations may be released. The FOIA would not be a basis for denying him this information. However, it also should be noted that, under the FOIA, requests from Congressmen acting in their individual capacities are not treated any differently from requests from the general public. The legislative history supports our conclusion that the information requested by Chairman Hanley may be released.

Thus, the original Act, Act of September 6, 1966, Pub. L. 89-487, 80 Stat. 383, amended § 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964 ed.). In discussing the Act of September 6, the Committee on Government Operations noted that a law controlling public access to government information has no effect upon Congressional access. Continuing, the Committee specifically stated that:

> Members of Congress have all of the rights of access guaranteed to any person by S. 1160,[1] and the Congress has additional rights of access to all government information which it deems necessary to carry out its functions. 1966 U.S. Code Cong. & Adm. News, p. 2429.

The Freedom of Information Act subsequently was amended. See Act of November 21, 1974, Pub. L. 93-502, 88 Stat. 1561. In discussing the 1974 amendments, the legislative history again made clear that these amendments were not to be interpreted as affecting the availability of information to Congress.

> That this bill amends subsections (a) and (b), but not (c), of section 552 should in no way be construed as approval by this Committee of the Justice Department's or any other agency's regulations or practices of withholding information from Congress. 1974 U.S. Code Cong. & Adm. News, p. 6274.

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[1] S. 1160 was the Senate version of the eventually-enacted legislation.

Accordingly, the FOIA does not prevent the release of information which Chairman Hanley may request.

The Privacy Act does not impair the release of information to Chairman Hanley.

The Privacy Act, 5 U.S.C. § 552a, was enacted primarily to safeguard the interest of citizens in informational privacy. Smiertka v. U.S. Department of Treasury, Internal Revenue Service, 447 F.S. 221 (D.D.C., 1978). Its legislative history is silent with respect to release of information to Congress. Likewise, there is no case law on this subject. However, the language of the Act, itself, is unmistakable.

Thus, § 552a(b) provides that:

> "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency. . .unless disclosure of the record would be -
>
> (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."

Since Chairman Hanley intends to make requests as Chairman of a subcommittee which investigates Civil Service matters, release of such information would not violate the Privacy Act.

Conclusion

Neither the FOIA nor the Privacy Act prevents HUD's release of information, including the names and results of investigations, which Chairman Hanley might request.

K. H. Sauer

K. H. Sauerbrunn
Associate General Counsel
for Regulatory Programs

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

SEP 28 1979

MEMORANDUM TO: Virginia M. Armstrong
Director, Office of Personnel, AP

SUBJECT: Legal Opinion Concerning Senior Executive Service Positions Within the Office of Inspector General

INTRODUCTION

On May 31, 1979, you requested a legal opinion from this Office concerning provisions of the Inspector General Act of 1978 which authorize the Inspector General "to select, appoint and employ" individuals to carry out the functions and duties of the Office of Inspector General and your authority to implement the Civil Service Reform Act of 1978. You raised a series of questions concerning the Inspector General's authority under the Inspector General Act of 1978 and the Secretary's authority under the Civil Service Reform Act of 1978 as they relate to the selection and performance review of positions within the Senior Executive Service.

We have reviewed the subject statutes, their legislative histories, and relevant case law and are of the opinion that the Inspector General's authority to select, appoint, and employ individuals to carry out the functions and duties of his office is autonomous. However, this authority is subject to the requirements of the Civil Service Reform Act. To the extent that the two statutes may appear to be incompatible, an effort should be made to reconcile by appropriate procedures any problems which may arise. This will require the cooperation of your office, the Office of Personnel Management, and the various Offices of Inspector General in establishing implementing procedures which satisfy the two statutes. A discussion addressing the issues raised by your memorandum follows.

BACKGROUND

1. Inspector General Act. The Inspector General Act of 1978, P.L. 95-452, 5 U.S.C. app., created Offices of Inspector and Auditor General in six executive departments and six executive agencies, including the Department of Housing and Urban Development, for the purpose of consolidating existing investigative resources to more efficiently combat fraud, abuse, waste, and mismanagement in

the programs and operations of those departments and agencies. Although HUD's Inspector General reports to and is under the supervision of the Secretary, Congress provided the Inspector General with a substantial degree of autonomy in carrying out his functions. For example, the Secretary is prohibited from limiting the scope or subject matter of an Inspector General investigation or prohibiting the Inspector General from issuing subpoenas which may be necessary to complete an investigation. To further insulate the Inspector General and provide an added measure of independence, he may only be removed from office by the President. See Section 3 of the Inspector General Act.

The extensive authority provided to the Inspector General is set forth in Section 6 of the Act. The specific authority regarding personnel administration, which is the subject of your May 31, 1979 memorandum, is found at Section 6(a)(6) of the Act. It states:

> 6(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act is authorized --
>
> > (6) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

By transferring the authority to administer OIG personnel matters to the Inspector General, the Congress recognized the significance of avoiding conflicts of interest that might arise if the head of an agency were to appoint the very employees who would investigate the programs and operations of that agency. The Congressional intent in drafting Section 6(a)(6) is clearly expressed in the Inspector General Act's legislative history:

> The Committee is aware that in most cases the authority to select and appoint officers and employees, obtain services from consultants and enter into outside contracts rests with the agency head and is delegated as appropriate to subordinate officials. However, because of the

> unique function of the Inspector and Auditor General and the possibility that such authority might be denied to him, in order to hamper his operations, the Committee has given him explicit authority to carry out these functions. Report of the Committee on Government Affairs, United States Senate, Report No. 95-1071, p. 35.

Thus it would appear that Congress gave the Inspector General a clear mandate to select, appoint, and employ his own personnel. However, on October 13, 1978, the day after Congress approved the Inspector General Act, Congress passed the Civil Service Reform Act of 1978, P.L. 95-454, 5 U.S.C. § 1101 note, which contains provisions which may be implemented in a way which conflicts with the spirit if not the letter of the law established by the Inspector General Act of 1978.

2. Civil Service Reform Act. The Civil Service Reform Act of 1978 brought sweeping changes to the operation of the civil service system. Included in this reform was the creation of a new service of Federal employees identified as the Senior Executive Service. 5 U.S.C. § 3131 *et seq*.. This service consists of "any position in an agency which is in GS-16, 17, or 18 of the General Schedule. . ." 5 U.S.C. § 3132(a)(2).

The manner in which candidates for Office of Inspector General Senior Executive Service positions are selected requires a reconciliation of the Inspector General Act with the Civil Service Act. There will be approximately four Senior Executive Service positions within the Office of Inspector General. The Inspector General Act authorizes the Inspector General to employ staff within his office subject to Title 5 of the United States Code. Title 5 includes the Civil Service Reform Act of 1978. The Civil Service Act provides elaborate procedures for the selection and performance review of Senior Executive Service positions including the establishment of an Executive Resources Board to recommend candidates for appointment and a Performance Review Board to review the performance of senior executives. 5 U.S.C. §§ 3393 and 4314, respectively.

The need for reconciliation of the two statutes arises with respect to the creation of an Executive Resources Board. Section 3393 of the Civil Service Act, 5 U.S.C. § 3393(b), requires "the head of an agency" to establish one or more Executive Resources Boards "from among employees of the agency" for the purpose of certifying career appointment candidates seeking Senior Executive Service positions. If the Secretary creates an Executive Resources Board for the Office of Inspector General from among employees of the agency, depending on the authority provided to the Board, the ability of the Inspector General to select key executives could be constrained in contravention of the clear intent of Section 6(a)(6) of the Inspector General Act. In sum, we have a specific Inspector General Act which expressly authorizes the Inspector General to select, appoint, and employ such officers and employees as may be necessary to carry out the functions of the Office of the Inspector General and a general statute in the form of the Civil Service Act which authorizes the Secretary to appoint a Board which recommends candidates to be selected by the appointing authority for Senior Executive Service positions.

It is our opinion, however, that these two statutes may coexist. Section 6(a)(6) of the Inspector General Act demonstrates Congress' concern for the independence of the Inspector General by authorizing the Inspector General and not the Secretary to appoint employees within the Office of Inspector General. Section 3393(b) of the Civil Service Act indicates Congress's concern with establishing a group of experts within an agency to review and certify senior executives for employment. The acts are not in "irreconcilable conflict"; on the contrary, if the Secretary as "head of the agency" appoints an Executive Resources Board from outside the agency, such as individuals from other agency Offices of Inspector General, or if alternative procedures for a Board can be designed to assure autonomy in selection, the two statutes will work in tandem.

In our view, therefore, Congress did not seek to comprehensively regulate the Inspector General when it enacted the Civil Service Reform Act. The Civil Service Act seeks to promote a competent, honest, and productive Federal work force; it is not concerned with regulating or interfering with the autonomous investigation procedures of the Office of Inspector General.

ANSWERS TO SPECIFIC QUESTIONS RAISED BY YOUR MEMORANDUM OF MAY 31, 1979

The questions raised by your May 31, 1979 memorandum represent a mixture of both policy and law. While as a matter of law the Inspector General's authority to select, appoint, and employ needed personnel is autonomous, the policies and procedures needed to implement this authority will require the consultation and cooperation of your office, the Office of Personnel Management, and the thirteen Offices of Inspector General.

A. Executive Resources Board

1. Question: IS IT LEGALLY PERMISSIBLE TO EXCLUDE THE DEPARTMENT'S EXECUTIVE RESOURCES BOARD FROM CARRYING OUT THE STAFFING FUNCTION FOR SENIOR EXECUTIVE SERVICE POSITIONS LOCATED IN THE OFFICE OF INSPECTOR GENERAL?

Answer: The Civil Service Reform Act requires the establishment of one or more Executive Resources Boards to recommend candidates to the appointing official. The Department presently has one Executive Resources Board comprised of Department managers selected by the Secretary to evaluate candidates for Senior Executive Service positions. The Inspector General is subject to Title 5 of the United States Code as it governs appointments in the Senior Executive Service. Therefore, the Inspector General must use an Executive Resources Board to certify candidates for Senior Executive Service positions. Since the Secretary is authorized to establish more than one Board, as appropriate, a separate Executive Resources Board or panel could be set up for the Inspector General in order to assure noninterference by HUD program officials in the certification of Inspector General candidates.

In the unlikely event that the Inspector General becomes concerned that highly qualified candidates are being eliminated by a less than objective certification process, it is our understanding that the Inspector General could always consider every qualified applicant so long as all applicants are afforded equal opportunity.

2. Question: (A) IS IT POSSIBLE TO INTERPRET THE USE OF INSPECTORS GENERAL FROM OTHER AGENCIES AS AN AGENT OF THE DEPARTMENT'S EXECUTIVE RESOURCES BOARD? (B) IF SO, WOULD THAT REQUIRE THE PERMISSION OF THE SECRETARY?

Answer: (A) YES. If the Secretary appoints Department managers to the Executive Resources Board, these managers will be able to certify the candidates who later will investigate their programs and offices. This is precisely the kind of controversy Congress sought to avoid in drafting Section 6(a)(6) of the Inspector General Act. How then may the Secretary avoid this dilemma when Section 3393(b) of the Civil Service Act requires the head of the agency to appoint members to this Board "from among employees of the agency"?

One suggestion is to have the Secretary appoint "employees" from Offices of Inspector General outside of HUD for membership on a separate Board or panel established to handle OIG selections. In that way no employees on the Board will later be investigated by the candidates they select. This proposal may require the detailing of individuals from other Offices of Inspector General to HUD for a single day while they sit on this Board. To accomplish this, the cooperation of your office, the Office of Personnel Management, and the thirteen Offices of Inspector General will be necessary. If such a plan is approved, it may be applied government-wide. For example, the Department of Labor could detail its OIG managers to HUD, and we in turn could transfer our OIG employees to that or some other federal agency.

(B) YES. Establishment of a separate Board or panel requires action by the Secretary.

B. Performance Review Board

3. Question: IS IT LEGALLY PERMISSIBLE FOR THE INSPECTOR GENERAL TO ESTABLISH A PERFORMANCE REVIEW BOARD FOR SENIOR EXECUTIVE SERVICE POSITIONS IN THE OFFICE OF THE INSPECTOR GENERAL?

Answer: Section 4314(c)(1) of the Civil Service Reform Act, 5 U.S.C. § 4314(c)(1), provides that "each agency shall establish, in accordance with regulations prescribed by this Office, one or more performance review boards, as appropriate." However, this provision does not specify which individual within the agency may appoint members to this Board. Assuming it is the head of the agency, that is, the Secretary, then she would be required to appoint a Board that satisfies the legislative intent of the Inspector General Act. She could, however, appoint a separate Performance Review Board for the Inspector General. The Office of Personnel Management is presently writing proposed regulations which should address this issue.[1]

4. Question: FOR SENIOR EXECUTIVE SERVICE POSITIONS IN THE OFFICE OF INSPECTOR GENERAL, DO THE RECOMMENDATIONS OF THE PERFORMANCE REVIEW BOARD GO TO THE SECRETARY OR THE INSPECTOR GENERAL FOR FINAL ACTION?

Answer: THE INSPECTOR GENERAL. Section 4314(c)(1) of the Civil Service Reform Act provides that the Board make its recommendations to the "appropriate appointing authority of the agency relating to the performance of senior executives in the agency." Neither the Civil Service Reform Act nor other civil service statutes or regulations define the term "appointing authority"2/; however, the Inspector General Act clearly vests "appointing authority" for OIG personnel in the Inspector General. Therefore, the Inspector General, and not the Secretary, would receive recommendations of the Performance Review Board.

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[1] We contacted OGC staff member Rhoda Lawrence (632-6124) of the Office of Personnel Management on June 6, 1979, and she informed us that it would be legally permissible for the Inspector General to establish his own Performance Review Board.

5. Question: IF IT IS THE INSPECTOR GENERAL, THEN PRESUMABLY HE/SHE CANNOT MAKE THE INITIAL APPRAISAL OF THE SENIOR EXECUTIVE'S PERFORMANCE. IS THE FOREGOING ASSUMPTION CORRECT?

Answer: YES. Section 4314(c)(2) of the Act requires the "supervisory official" of the senior executive to provide the Board with an initial appraisal of the senior executive's performance. Since the Inspector General is the appointing authority who makes the final performance appraisals, in those situations where he is the supervising official of senior executives in his office some other method of initial review will have to be devised.

6. Question: CAN THE INSPECTOR GENERAL SUBMIT TO THE OFFICE OF PERSONNEL MANAGEMENT RECOMMENDATIONS OF CAREER APPOINTEES IN THE OFFICE OF THE INSPECTOR GENERAL FOR THE AWARD OF MERITORIOUS OR DISTINGUISHED EXECUTIVE?

Answer: Section 4507(b) of the Act, 5 U.S.C. 4507(b), states that "each agency shall submit . . . appointees in the agency to be awarded the rank of Meritorious Executive or Distinguished Executive" without specifying who within the agency shall submit such names. If the head of the agency has ultimate responsibility for submitting awards to the Office of Personnel Management, then the Secretary would make the appropriate recommendations. However, if the appointing authority has this responsibility, then this determination would be made by the Inspector General. With only four employees eligible for such awards, it is questionable whether this authority should rest with the Inspector General. Again it will be necessary to consult with the Office of Personnel

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2/ This information was received from OGC staff member Gail Goldberg (632-4518) of the Office of Personnel Management on June 6, 1979. She indicated that the term "appointing authority" was used by the drafters of the Civil Service Reform Act instead of the head of the agency, because they realized that the appropriate authority making selections and appointments would vary.

Management. The Office of Personnel Management is presently writing proposed regulations which should address this issue.

C. Pay in the Senior Executive Service

7. Question: SINCE THE INSPECTOR GENERAL IS AN APPOINTING AUTHORITY, IT WOULD APPEAR THAT HE/SHE HAS THE RESPONSIBILITY FOR DETERMINING THE BASIC PAY RATE FOR EACH SES MEMBER IN THE OFFICE OF THE INSPECTOR GENERAL. IS THAT INTERPRETATION CORRECT?

Answer: YES. Section 5383(a) provides for "each appointing authority" to determine which rates shall be paid to each senior executive. Since the Inspector General is the appointing authority for the Office of Inspector General he would determine basic pay rates for Senior Executive Service positions within his office. However, "the amount of a performance award" under § 5384 of the Civil Service Reform Act for career appointees in the Senior Executive Service is determined by the "agency head," based on recommendations of the Performance Review Boards.

8. Question: SECTION 5383(c) ALLOWS FOR ONE PAY ADJUSTMENT DURING ANY 12-MONTH PERIOD. (A) DOES THE INSPECTOR GENERAL HAVE THE AUTHORITY TO GRANT (OR DENY) THIS PAY ADJUSTMENT FOR SENIOR EXECUTIVES IN THE OFFICE OF THE INSPECTOR GENERAL? (B) DOES THE SECRETARY HAVE THAT AUTHORITY FOR EXECUTIVES IN OIG?

Answer: (A) YES. The appointing authority may grant adjustments in pay rates for senior executives, and the Inspector General is the appointing authority for purposes of § 5383 regarding senior executives in his office. (B) If you are asking whether the Secretary rather than the Inspector General has authority for granting pay adjustments for Senior Executive Service positions in the Office of Inspector General, the answer is no.

D. Classification Authority

9. Question: BY VIRTUE OF THE FACT THAT THE INSPECTOR GENERAL IS THE APPOINTING AUTHORITY FOR POSITIONS IN THE OFFICE OF THE INSPECTOR GENERAL, DOES HE/SHE ALSO HAVE CLASSIFICATION AUTHORITY OVER THOSE POSITIONS?

Answer: Senior Executive Service positions are not subject to the Classification Act, 5 U.S.C. § 5101 et seq. Therefore, the issue over who has classification authority over these positions is moot.

For GS-15 positions and below, it would be necessary for the Inspector General to obtain a delegation of authority from the Secretary in order to classify these positions within his office. This practice is already being followed by the Office of Personnel within the Department of Agriculture's Office of Inspector General.

Comments on Questions Raised and Experiences of Other Agencies

The difficult questions raised by your May 31, 1979 memorandum are all issues of first impression. Unfortunately the Office of Personnel Management, which regulates civil service matters, has not formally addressed these issues. Likewise, with the exception of the Department of Agriculture, no other agency has taken positive steps to resolve the questions raised by your memorandum. We contacted the Director of the OIG Office of Personnel at the Department of Agriculture, Lawrence Dean. Mr. Dean stated that it is the position of the Acting Inspector General at Agriculture, Thomas F. McBride, that his authority to select, appoint, and employ individuals within his office is autonomous. Accordingly, Mr. McBride created an Office of Personnel within the Office of Inspector General. Its responsibilities include appointment and classification of all positions within the OIG at grades GS-15 and below.

With respect to Senior Executive Service positions, Mr. Dean reiterated his office's position that the Office of Inspector General is autonomous in personnel matters, yet informed us that the Inspector General has requested a delegation of authority from the Secretary to transfer appointing authority for senior executives from the Department of Agriculture's Office of Personnel to the Office of Inspector General. Mr. Dean further stated that his office is awaiting a legal opinion on this question from their Office of General Counsel.

Again we note that no agencies have adequately addressed the issues raised in your memorandum.

CONCLUSION

It is our opinion that the Inspector General is independent of HUD's Office of Personnel for purposes of selecting, appointing, and employing individuals within the Office of Inspector General. The express language of Section 6(a)(6) of the Inspector General Act and the clear intent of Congress found in the Act's legislative history evidence this fact. The Inspector General, however, must administer personnel matters in compliance with the Civil Service Reform Act. While conflicts between the two statutes exist, these conflicts are not "irreconcilable." The Congressional intent of both acts may be satisfied.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

HUD-96 (4-72) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Mortgagee Review Board

DATE: JUL 19 1979

IN REPLY REFER TO:

FROM : John P. Kennedy, Regulatory Programs Division, GR

SUBJECT: Federal Register Publication of Mortgagee Letters

I. Statement of the Problem --

Actual notice of a requirement or policy statement contained in a mortgage letter, unless stipulated to by a mortgagee/respondent, must be proven in any administrative proceeding where the Department's action is/was predicated on a violation of that requirement or policy.

II. Present Mortgagee Mailing List Maintenance Procedures --

Mortgagee letters are mailed to each approved mortgagee, branch office, authorized agent and other interested party whose address appears on the mailing list maintained by Printing and Visual Arts Division of the Office of General Services Administration. While all HUD offices can provide copies upon request and periodic recapping mortgagee letters are issued, actual receipt is presently relied upon.

Responsibility for address change/corrections is currently in the Management Analysis and Services Division of the Office of Management, Housing. That office obtains address information from various sources including the mortgagee directly, field offices and other Central Office recipients, but primarily from the Office of Mortgagee Activities.

The procedure for making a mailing list change is essentially the same throughout HUD. The initiating office completes a HUD-701 which contains the current address, the immediate past address and the date of the change. Previous HUD-701 forms relating to that party are then disposed of.

III. Problems Resulting From Present Procedure --

The Management and Services Division, while nearly current on address changes it has been requested to make, relies on other input. A mortgagee which properly notifies the Department of a change cannot be certain that that notification either reaches the appropriate office or that that office forwards the change to Management and Services. Until recently, we are informed, this problem resulted in change delays of up to five years and over 25% inaccuracy in the list as a whole. While the OMA Task Force effort has reduced the problem significantly and future computerization will offer further assistance, the problem has not been eliminated and total accuracy is probably impossible. Of equal importance is a verification problem inherent in the mailing list maintenance procedure itself. There is not now, nor is there planned to be, a system which can uniformly verify to what address a particular letter was mailed. If the HUD-701 contains the address of the mortgagee (either as current or immediate past) at the time of the subject mailing, the verification is possible. If the mortgagee has moved several times, earlier addresses and the corresponding date of HUD's corrections are not available.

It should also be noted that actual receipt of previously-issued mortgagee letters which continue to be operative will not be verifiable in many cases, notwithstanding any change in mailing list procedures. This result grows out of the above mentioned general verification problem and the previous state of the mailing lists also discussed above.

IV. Legal Considerations Involved in Federal Register Publication --

A. Why is actual notice required?

The stated problem of a required showing of actual notice is primarily an outgrowth of 5 U.S.C. 552. Section 552(a)(1) states, in pertinent part, that

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --
>
> (D) . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency . . .

Except to the extent that a person has actual and timely notice of the terms thereof, a person may

> not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published.

In Chicago Housing Authority v. Harris, 275 N.E. 2d 353, plaintiff housing authority had received Renewal and Housing Management Circular letters and had acknowledged receipt in oral arguments. The court held that, despite the failure to publish such letters in the Federal Register (it was also held such letters were required to be published by §552(a)(1)(D)), the requirements contained in the unpublished circular letters could be imposed on the plaintiff who had actual notice. This case establishes several points relevant to this discussion. First, mortgagee letters, which are the mortgage insurance program's substantial equivalent to Renewal and Housing Management Circulars, are presently required to be published by the above statute. Such a result is consistent with a series of cases which have found documents and agency actions with analogous impacts to mortgagee letters to be "statements of general policy" within the meaning of the above paragraph (D) of §552(a)(1). See Noel v. Chapman, 508 F.2d 1023; PG&E v. F.P.C. 506 F.2d 33. Second, as the holding indicates, the only sanction for failure to publish would have been on inability to impose the requirements on a party not having actual notice. Rodriguez v. Swank, 318 F. Supp. 289 (D.C.); US v. San Juan Lumber Co., 313 F. Supp. 703 and cases therein cited. Finally, actual notice of the agency action overcomes the effect of nonpublication, thus the present need to prove actual notice in administrative hearings in which the Department relies on a mortgagee letter.

B. What Are the Legal Effects of Publication?

(1) Constructive Notice -- While 5 U.S.C. 552 requires publication or actual notice prior to imposing a requirement, 15 U.S.C. 1507 provides the legal basis for the position expressed therein. That section provides that the

> . . . filing of a document. . .required. . .to be published by section 1505 of this title. . .is sufficient to give notice of the contents of the document to a person subject to or affected by it.

Numerous cases have held that publication in the Federal Register results in constructive notice to an affected party U.S. v. Messer Oil Corp., D.C. Pa. 1975, 391 F. Supp. 557; Hahn v. Alaska Guaranty Co., Alaska 1976, 557 P. 2d 143; U.S. v. Alabama Highway Express, D.C. Ala. 1942, 46 F. Supp. 450.

(2) Procedures for Amendment of Published Mortgagee Letters -- The current system requires the issuance of a new mortgagee letter to rescind or modify the old and establish new procedures. Such a letter would have to be published. Section 552(a)(1)(E) requires publication of "each amendment, revision or repeal of [statements of general policy]."

(3) Need for Public Comment or Delayed Effectiveness -- Section 553 of Title 5 generally requires advance notice of proposed rulemaking, public comment and a delay of not less than 30 days after publication of the final rule. Section 553(b)(3)(A) and (a)(2) exempt "statements of policy" from those requirements. See Noel v. Chapman, infra; Pacific Lighting Service Co. v. F.P.C., 518 F. 2d 718 (9th Cir., 1975).

C. Is the Office of the Federal Register Empowered to Publish Such Documents? -- Section 1505(a)(3) of Title 15, U.S.C., requires the Office of the Federal Register to publish "documents or classes of documents that may be required so to be published by Act of Congress". See also 1 C.F.R. 5.2(b). Section 552(a)(1)(D) establishes such a requirement with respect to documents constituting statements of policy and we have concluded that mortgagee letters constitute such documents. The Federal Register regulations establish four categories under which a document might appear. Section 5.9(d) establishes a category, "Notice," which is a catch-all section for documents not covered under the other categories. Mortgagee letters appear to fall within this category. Moreover, it should be noted that, while the Office of the Federal Register is the ultimate arbiter of what is publishable and in what form, we are informed that, as a practical matter, great deference is shown to agency determinations and document classification.

D. Can Less Than the Full Text be Published? -- Publication of a list of available letters (such as is now done on a six-month basis without Federal Register publication) or a notice setting forth the subject/title of each letter apparently is not sufficient to satisfy the notice requirements of §552(a). See 1 C.F.R. 51.3, and Appalachian Power Co. v. Train, 43 Ad. L. 2d 819 (4th Cir.).

Less than the full text of a document may be published and still satisfy all notice requirements if such publication satifies the incorporation by reference procedures authorized by §552(a) and set forth in 1 C.F.R. Part 51. While those procedures are too numerous to restate and comment on here, several are important to note:

First, explicit approval of the Director of the Office of the Federal Register is required for each notice so published. See § 51.1. This includes a required consultation ten working days prior to submission. See § 51.10. Second, the incorporation must result in a substantial reduction of the volume of material published in the Federal Register. See § 51.4(b). The number of one- and two-page mortgagee letters raises questions regarding this requirement.

Third, general availability is required beyond our present mailing procedures. Copies of all mortgagee letters so incorporated must be maintained with sufficient indexing to permit easy determinations regarding current status of each such letter.

E. HUD Requirements -- 24 C.F.R., Section 10.1 of the Department's regulations, established a broad policy in favor of publication. It does track, however, the exceptions from public comment and effective date delay contained in 5 U.S.C. 553 for statements of policy. HUD Handbook 010.2 REV. essentially is similar in impact.

It should be noted that the procedures of the Department in this area have recently come under stiff criticism from the House Banking, Finance and Urban Affairs Committee as expressed in H.R. Rep. No. 154, 94th Cong., 1st Sess. 5 (1979). It can be expected that the new legislative review process (§ 7(o) of the Department of Housing and Urban Development Act of 1965, as amended) will draw greater attention to the Department's actions in this area and, as the language of the report indicates, nonpublished documents containing substantive policy will be examined closely. The publication of mortgagee letters, as statements of policy in the Notice section, would satisfy at least the public notice concern of the committee. It should also be noted that § 7(o) does not require Congressional review of policy statements; the statute speaks only of "rules and regulations," and such terms, as defined by statute, common usage and the Regulations and Issuances Staff of OGC, do not include statements of policy.

V. Alternative Procedures for Disseminating Mortgagee Letters

A. Present System of Actual Delivery Only

(1) Arguments in Favor

(a) Expedition

(i) Slightly shorter clearance - advantage ultimately eliminated, if publication adopted, after initial experience

(ii) Immediate reaction to events requiring changes in policy - to the extent a mortagee letter is now a vehicle for such changes

(b) Format flexibility

(2) Arguments in Opposition

(a) Requires proof of actual receipt/notice which may not be verifiable

(b) Is in violation of Administrative Procedures Act and Departmental regulations and policy

(c) Will come under scrutiny of Congress as a class of unpublished documents

B. Publication in Federal Register of Complete Text

(1) Arguments in Favor

(a) Provides constructive notice of all policy statements announcing new requirements which will be enforced against mortgagees

(b) Satisfies APA and HUD requirements and policy

(c) Avoids Congressional review

(2) Arguments in Opposition

(a) At least initially may result in delays in clearance

(b) Effective date for constructive notice purposes may be somewhat delayed between issuance and publication

(c) Format may be somewhat structured

C. Publication as Incorporation by Reference

(1) Arguments in Favor

(a) Same as B above

(b) Less voluminous; cost of publication reduced

(2) Arguments opposed

(a) Same as B above

(b) Possibly more cumbersome procedurally to have published.

John P. Kennedy

John P. Kennedy
Deputy Associate General Counsel

SEP 19 1979

MEMORANDUM TO: D. Glen Dale
Assistant Director, Audit Operations

FROM: K. H. Sauerbrunn
Regulatory Programs Division

SUBJECT: Legal Opinion on Potential
Conflict of Interest

Introduction

This memorandum is in response to your request of August 17, 1979 for a legal opinion as to whether the awarding of noncompetitive contracts to an 8a firm was improper. In addition, the background information which you supplied raised the issue of whether a conflict of interest may have existed pursuant to applicable regulations with respect to two individuals who were involved either in the award of or receipt of these competitive contracts. After having legally researched and reviewed the subject regulations, we are of the opinion that the award of these noncompetitive contracts to an 8a firm was not improper. Further, we have identified HUD regulations which may have application in terms of the two individuals. An explicit conclusion in this regard would require developing additional information as to the roles of the respective parties in these transactions.

Issues Presented

1. Whether the noncompetitive award of contracts to an 8a firm is improper.
2. Whether HUD regulations may have application with respect to William Kelly.
3. Whether HUD regulations may have application with respect to Robert Scott.

Statement of Facts

In or around May of 1978, a contract for the development of a communications program was awarded to the Systems Research Corporation (SRC). The contract number was 4303. Under this contract, SRC also awarded a subcontract to University Science Corporation (USC).

Following completion of the development contract, HUD was concerned with implementing the communications program. Accordingly, in or around September of 1978 the implementation contract was awarded, again to SRC. This contract number was 4316. It is an open-ended contract since, at the time of its execution, it was impossible to identify all of the services which subsequently would be required.

When 4316 was executed, HUD also was aware that additional subcontracts would have to be awarded by SRC. The additional contracts are referred to as task orders, and to date nine such task orders have been awarded. In particular, SRC awarded a subcontract to USC for Task Order No. 1. This subcontract was awarded during the period 4316 was executed and, under the subcontract, USC was to identify constituent needs.

Besides USC, SRC also awarded subcontracts to AVCOM Corporation. According to Timothy O'Hara, a contract specialist in the Research and Demonstration Division of the Office of Contracts and Procurement,[1] AVCOM likewise was awarded a subcontract for Task Order No. 1. Therein, AVCOM was obligated to undertake the audio-visual taping of HUD personnel. Besides Task Order No. 1, AVCOM also was awarded additional subcontracts for Task Orders No. 2, 4, and 7. For Task Order No. 2, also awarded during the period 4316 was executed, AVCOM produced a film for HUD's Office of Interstate Land Sales Registration. For Task Order No. 4, awarded in or around January of 1979, AVCOM produced an audio-visual film for Region No. 7. Finally, for Task Order No. 7, awarded in or around February of 1979, AVCOM produced a film for the Federal Emergency Management Agency.

During the periods of time when 4303 and 4316 were negotiated and, where applicable, executed, Robert Scott was employed by HUD as a "While Actually Employed" (WAE). For these same periods of time, however, Mr. Scott also allegedly was a consultant for SRC and was the president of AVCOM Corporation. Mr. Scott left HUD's employment shortly before the 4316 contract was executed.

In addition, Mr. William Kelly was employed by HUD in the Office of Public Affairs. In particular, he was directly involved in the award of the 4303 and 4316 contracts to SRC, and he also was employed by HUD during the period of time when various subcontracts were awarded to AVCOM. According to Mr. O'Hara, Kelly, a friend of Scott's, now is employed by FEMA.

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[1] For 8a contracts, an "officer" in a Federal agency is responsible for procurement. Mr. O'Hara is the assistant to the procuring officer for 4303 and 4316.

Discussion

1. Whether the noncompetitive award of contracts to an 8a firm is improper.

In addressing this issue, it should be noted that 8a contracts are derived from Section 8a of the Small Business Act of 1953, 15 U.S.C. § 631, et seq. The purpose of 8a contracts is to assist small business concerns owned and controlled by socially or economically disadvantaged persons. 15 U.S.C. § 631. Before an 8a contract is awarded, the procuring agency of the government, in this case HUD, first must identify suitable procurements. It then informs the SBA of the potential procurement, whereupon SBA must decide whether to commit itself. If it does, the prime contracts, here 4303 nd 4316, are executed between the procuring agency and the SBA.

In terms of small business concerns, here SRC, the procuring agency in practice negotiates the subcontract with these companies.[2] Once the negotiations are completed, the procuring agency prepares and forwards the necessary documents to the SBA. These documents include the prime contract between itself and the SBA, as well as the subcontract between SBA and the small business concern. Once executed, the procuring agency is delegated authority to administer the contracts.

Turning directly to the issue presented, the statute specifically permits negotiating the 8a contracts with the small business concerns. 15 U.S.C. § 637(a)(1)(C). This means that 8a contracts, by their very definition, are awarded on a noncompetitive basis and, for this reason, the award of the 8a contracts to SRC was not improper.

2. Whether HUD regulations may have application with respect to William Kelly.

According to Naomi Chapman, Acting Director of Personnel Operations, William Kelly was initially employed by HUD for a period not to exceed 130 days. Although his employment subsequently was extended on several occasions, Kelly, under HUD regulations, would be considered a special employee. See 24 C.F.R. 0.735-102.

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[2] 8a contracts also permit the small business concerns to award additional subcontracts.

As previously mentioned, Kelly was directly concerned with the development and implementation of the communications program, and was a friend of Mr. Scott's, AVCOM's president. Based solely on this information, we, of course, are unable to state whether there exists an actual conflict of interest. However, we have been able to identify three regulations with potential application, and the regulations follow.

First, 24 C.F.R. 0.735-301 provides:

> A special government employee shall not use his government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

Therefore, in the event further investigation is warranted, it will be necessary to determine whether a special employee used his employment for the private gain of himself or another.

24 C.F.R. § 0.735-302(a) also may have application. It provides:

> A special government employee shall not use inside information obtained as a result of his government employment for private gain for himself or another person either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under government authority which has not become part of the body of public information.

Under this regulation, it would be important to know whether a special employee used inside information which was obtained directly or indirectly because of his government employment for the private gain of himself or another.

Finally, 24 C.F.R. § 0.735-207, which applies to special employees (see 24 C.F.R. § 0.735-305) also may have application. It provides:

> For the purpose of furthering a private interest, an employee shall not, except as provided in § 0.735-204(e),[3] directly or indirectly use, or allow the use of official information obtained through or in connection with his government employment which has not been made available to the general public. [Footnote added.]

For this regulation, it would be necessary to consider whether an employee, including a special employee, used or permitted the use of official inside information which was obtained through or in connection with his employment in an effort to further a private interest. This regulation is similar to § 0.735-302.

3. Whether HUD regulations may have application with respect to Robert Scott.

Robert Scott was employed by HUD as a WAE during the same period of time that he allegedly was a consultant for SRC. Although his HUD employment was unrelated to the communications program, he still was involved by virtue of his relationship with SRC. According to O'Hara, he rendered technical advice on SRC's behalf, but he was not involved in actual cost negotiations. Of course, Scott also was president of AVCOM throughout this period of time. Here, it also should be noted that, when Scott began his HUD employment, it was to exceed 130 days. Hence, under HUD regulations, he was not a special employee.

There was insufficient information available for us to determine whether the contracts awarded to Robert Scott amounted to an actual conflict of interest. However, we have been able to identify two regulations which may have application.

First, 24 C.F.R. § 0.735-205(b)(1) provides:

> No employee, including a special government employee, may participate as such in any matter in which to his knowledge he, his spouse, minor child, organization in which he is serving as an officer, director, trustee, partner,

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[3] This exception involves outside teaching, lecturing, and writing and, as such, it would have no application to this case.

> or employee, or a partner has a financial interest . . .

Under this regulation, it would be necessary to determine whether an employee participated in a matter in which he has a financial interest.

24 C.F.R. § 0.735-204(a)(8) also may have application. It provides:

> An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his government employment. Incompatible activities include but are not limited to: employment with any person, firm, or other private organization having business either directly or indirectly with the Department.

If additional investigation concerning this regulation is warranted, it should focus on whether a government employee was employed by another concern which did business directly or indirectly with the Department.

Additional Information

Apart from identifying potentially relevant regulations, we obtained additional information from Mr. O'Hara which we believe would be material if further investigation into this matter is warranted.

First, HUD was anxious to have the communications program developed and implemented. Both HUD and SBA considered SRC an attractive candidate since it was an 8a firm and since it would be responsible for a large and visible project. A drawback with SRC, however, was the fact that it had not previously done business in Washington, D.C. To minimize this, HUD took an active interest in SRC, and this interest included HUD initially recommending subcontractors such as AVCOM and USC. SRC, however, always had the final word in choosing the recipients of these subcontracts. In short, according to O'Hara, HUD's active interest in SRC arose because of its desire to have the program itself succeed and because of its desire to have an 8a firm involved.[4]

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[4] It should be noted here that the background information attached to the request of August 17, 1979 mentioned the fact that USC recommended the awarding of the prime contract to SRC. Standing alone, we are unaware of any regulations which prohibit the making of such a recommendation.

Mr. O'Hara also supplied additional information with respect to AVCOM. Thus, AVCOM performed most of its work on a fixed-price basis, and because of this arrangement it actually lost money. This, in turn, has created a certain animosity between Scott and Kelly.

Also, AVCOM is no longer performing any work for the program. It is in serious financial difficulty, and, in Mr. O'Hara's opinion, the work already performed by AVCOM was "adequate to good." The latter point suggests that HUD was not harmed by the award of the subcontracts to AVCOM.

Remedies

One last area still must be discussed, and this concerns the sanctions available against Kelly and Scott. For the purposes of this section, we have assumed that there exists a conflict of interest.

Initially, we are satisfied that there are no criminal violations. See, for example, 18 U.S.C. § 208, which is the statute most often involved in conflict of interest cases. At the same time, since Scott and Kelly have left HUD, HUD's general regulations pertaining to conflict of interest do not apply. See 24 C.F.R. § 0.735-105; 24 C.F.R. § 0.735-106. Examining administrative sanctions, only one appears to have any application, and that is Part 24 of the regulations dealing with debarment, suspension and temporary denial of participation. However, these sanctions are unavailable, since Part 24's language requires one now to be a contractor or grantee.[5] See In the Matter of Howard Dean Haskin, Docket No. 77-552-DB (1978). Even a more liberal interpretation would envision one becoming a contractor or a grantee in the near future.[6] Of course, neither is present in our case. The result is that, even assuming a conflict of interest exists, HUD could not now invoke any sanctions against the two individuals.

Conclusion

The noncompetitive award of the 8a contracts was not improper. There also is insufficient information upon which to state whether a conflict of interest existed. However, certain potentially relevant regulations have been identified. Likewise, additional information has been supplied which may be considered in determining whether further investigation is warranted. Lastly, it is our opinion that, even if a conflict of interest existed, HUD is at this time without any remedies to pursue the individuals involved.

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[5] Part 24 otherwise could be invoked because it applies to former employees (24 C.F.R. § 24.3(5)) and because the definition of contractors or grantees includes consultants (24 C.F.R. § 24.4(f)).

[6] Proposed changes to the Part 24 regulations specifically adopt the liberal interpretation.

K. H. Sauerb

K. H. Sauerbrunn
Associate General Counsel
for Regulatory Programs

SEP 20 1979

MEMORANDUM TO: John C. Yazurlo
Assistant Inspector General
for Audit, ZA

SUBJECT: Property Tax Servicing Function Review

This is in response to your memorandum of July 12, 1979.

I. OGC Tax Sale Case Management and Record-Keeping Procedures

Your report addresses the record-keeping procedures utilized by the Home Mortgage Branch (HMB) of my office with respect to the tax sale cases referred to it for litigation and/or negotiation. Your investigation revealed that that office did not maintain a separate inventory of the "numerous" cases involving tax sales. It was therefore impossible to cross-check this source with the Office of Finance and Accounting and others to verify, with accuracy, the number of cases involving tax sales of Secretary-held properties. It was stated that the Office of General Counsel's maintenance of an inventory list would reduce HUD's vulnerability to further sales of its properties.

I have no objection in principle to the recommendations in this area contained in the report. A separate inventory of these cases, listing a property description, status of the case and property value (where provided by the relevant field office), is reasonable. Periodic (perhaps semi-annual) reports to the Office of Single Family Housing and the field office involved are also appropriate. If the "system to continually update" the inventory list when new cases are added means an affirmative obligation by the Office of General Counsel to report each such addition to all the relevant parties, I might suggest that this function could more easily be performed by the referrer of the case and thereby avoid an added burden to this office. The periodic reporting procedure, together with the Office of Finance and Accounting's affirmative obligation to compare information, should be a sufficient check on accuracy.

The nature of my office's involvement in this matter should be pointed out. First, a slight misunderstanding should be corrected. The report quotes HMB attorneys as stating that that office was handling "numerous" tax sale cases. I am informed that the number involved never exceeded forty. Such a number is not exceedingly large from a litigation point of view. I cannot comment on the significance of this number from a record-keeping point of view, but I felt you should have this information to put my office's involvement in some perspective. Second, the report's contention that the risk of further tax sales involving HUD properties would increase as a result of the HMB's record-keeping activities is incorrect. That office has referred to it primarily cases involving properties where tax sales have already occurred and, furthermore, where the redemption period has expired. The Department, therefore, has already suffered the greatest of losses, that of the property, and this office is concerned with attempting to rectify or minimize that loss. The HMB is also involved with tax sales as the recipient of an occasional erroneously-addressed notice of such a sale from a local taxing authority and as supervising counsel on foreclosures of assigned mortgages which occasionally involve tax sales. Such notices are promptly forwarded to the Office of Finance and Accounting by memorandum, advising that immediate attention be given to the matter. Tax sales on properties encumbered by a Secretary-held mortgage are expeditiously handled when they arise and do not result in loss to the Department.

These cases are currently being maintained in the manner in which the Inspector General's Office found them in 1978. Records on individual cases are maintained in the same manner as any other pending or active litigation case and reported in the same way. No separate list of tax sale cases has been broken out.

II. Payments of "Inflated" Tax Obligations

You also inquired regarding the propriety of paying (1) charges for tax penalties; (2) nondiscounted taxes where a discount was available; and (3) taxes inflated by unappealed over-assessments. You expressed concern as to whether these categories of real property tax expense were properly charged against the insurance funds, particularly those funds with a mutuality characteristic.

Discussions between our staffs have resulted in a refinement and clarification of this inquiry. The question, as I am now informed, is whether any legal impediment exists to the payment by the Department of these tax penalties where such penalties result from the Department's negligence as a mortgagee administering tax reserve (escrow) accounts. The context in which this inquiry is made apparently involves a finding by your office regarding the absence of clear procedures for assigning responsibility between the Department and the mortgagor for failure to meet tax obligations in a timely fashion. Your office wishes to make recommendations in this area but is seeking my office's advice regarding the legality of any payment of this kind by the Department.

My office has been unable to locate any statutory or regulatory authority which specifically sets out how the Secretary is to administer HUD-held mortgages. However, where the Secretary acquires a mortgage to avoid foreclosure, the provisions of Section 204 of the National Housing Act relating to the rights, liabilities, and obligations of the mortgagee apply to the Secretary in accordance with and subject to the regulations prescribed by the Secretary. 12 U.S.C. § 1715u.

The Secretary has the authority to accept assignment of mortgages, act as mortgagee, and sell the acquired property on credit. 12 U.S.C. § 1715u; 12 U.S.C. § 1710(g). Although these provisions do not explicitly authorize expenditures by the Secretary in connection with the mortgages, the Secretary must act as mortgagee.

Thus, the Department has made expenditures in connection with assigned mortgages, and such expenditures have generally arisen out of the rights and obligations incident to the mortgagee-mortgagor contract relationship defined in the security instrument. While there is considerable doubt as to whether the FHA security instrument creates an obligation with respect to tax penalties (see Boyce v. National Commercial Bank and Trust Co., 41 Misc. 1071, 247 NYS2d 521 (1964)), I am sufficiently persuaded that the instrument creates some duty on HUD to administer the escrow accounts established by the instrument. I would conclude, therefore, that an expenditure from the relevant insurance fund for the payment of a tax penalty caused by HUD's error is a legally permissible payment. We have been unable to identify any impediment to HUD's payment of the obligation.

The manner in which your initial inquiry in this area was phrased suggests that your office had some doubt about the legality of these payments in light of a Departmental fiduciary obligation with respect to the mutual insurance funds. Without attempting to define the Department's responsibility to those mortgagors who will receive distributive shares from the funds, I can state that, even assuming a fiduciary obligation, this does not prevent payment of these tax penalties. While the participants in the funds might seek reimbursement from the Department, the primary or initial obligation is properly charged against the insurance fund.

It should be noted that, as I am informed, the existing Department policy is to pay any tax penalty where it results from Departmental error. In this, the Department tracks its insurance regulations (24 C.F.R. § 203.550(a)), which impose this obligation on insured mortgagees. It is also my understanding that the Office of Single Family Housing, Loan Servicing Division, has in preparation a revision to HUD Handbook 4015.8, Administration of Secretary-Held Home Mortgages, to specifically state this requirement and to provide criteria for determining the responsibility for the error. The manner in which they propose to deal with failure to pay by a discount date is unclear beyond tracking the insurance regulation, § 203.550(a), which appears to advise mortgagees that payment by discount date is proper servicing but does not mandate that the mortgagee pay the difference. The appeal of over-assessments, even where the mortgagee (HUD) is the only recipient of assessment notification, has, to my knowledge, not been addressed in either the insurance or the Secretary-held situation. It must be assumed that such obligation is always with the mortgagor.

Assessment notification is not addressed, to my knowledge, in either the insurance program or in any proposed or existing guidelines for servicing Secretary-held mortgages. I can perceive a difference between penalties imposed and discounts not taken through Departmental error and the failure to appeal over-assessments. This obligation is clearly the mortgagor's alone, since there is no agreement, implied or express, that the mortgagee will act in this area.

While I understand that the question you have posed does not necessitate a treatment of these issues in connection with Secretary-held property, I wish to briefly touch upon that subject here. It is clear that HUD is obligated to pay real property taxes on property which the Department owns. 12 U.S.C. §§ 1706b, 1714, 1741, 1747, and 1750e. The language of these provisions is identical and has been generally interpreted by the courts as placing the Department in the same position as any other taxpayer in a given jurisdiction. Byram Holding Co. v. Borgen, 63 A2d 822 (1949); U.S. v. General Douglas MacArthur Senior Village, Inc., 337 F. Supp. 955 (1972). While there is much dispute as to the extent of the collection efforts which a local jurisdiction can take (Byram, supra (divestiture not permitted against the Federal property interest)), it appears likely that collection of penalties for late payment which were the same as imposed on other taxpayers in the same position would probably be supported. The Department, therefore, is obligated to make such payments, and they are properly paid from the relevant insurance fund. The same is true of nondiscounted taxes or taxes based on unappealed over-assessments.

It should be noted that, as we are informed, payment of the subject obligations has been the policy under the various mortgage insurance programs since their inception. For one current expression of that policy, see HUD Handbook 4310.28, paragraph 29(a), which expressly permits the payment of penalties and interest on a delinquent tax obligation.

If I can be of further assistance, please contact my office.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

EQUAL OPPORTUNITY

HUD-96 (4-72) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMEN

TO : Sterling Tucker, Assistant Secretary
Fair Housing and Equal
Opportunity, F

DATE: AUG 20

IN REPLY REFER TO:

FROM : Edward Norton, Acting General Counsel, G

SUBJECT: Section 504 of the Rehabilitation Act of 1973

This memorandum is in response to your request for a legal opinion regarding (1) remedies which your Office may utilize for noncompliance with Section 504 prior to the effective date of HUD's Regulation; and (2) retroactivity of the final Section 504 Regulation to complaints received prior to its issuance.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, prohibits discrimination on the basis of handicap under any program or activity receiving Federal financial assistance or under any program conducted by an Executive agency. The Department of Health, Education and Welfare (HEW) is designated by Executive Order 11914, "Nondiscrimination with Respect to the Handicapped in Federally Assisted Programs," to coordinate the implementation of Section 504 by all covered Federal departments and agencies. In particular, HEW is directed to ensure that consistent policies, practices and procedures are adopted with respect to the enforcement of Section 504. The Executive Order directs each Federal department and agency empowered to provide Federal financial assistance to issue rules and regulations consistent with the standards and procedures established by HEW, and empowers each covered agency to secure compliance, in accordance with the standards and procedures established pursuant to the Order, through voluntary means. In addition, the Order provides that no suspension or termination of, or refusal to award or continue, Federal financial assistance shall become effective unless there has been an express finding of noncompliance, after opportunity for a hearing.

On January 13, 1978, HEW published a final rule at 43 Fed. Reg. 2132 (45 C.F.R. Part 85) implementing Executive Order 11914; the rule sets out the responsibilities of Federal agencies in enforcing Section 504 and establishes guidelines for determining discriminatory practices. Pursuant to HEW's Regulation, HUD published its proposed Regulation on April 19, 1978, at 43 Fed. Reg. 16652, but has not yet issued its final Regulation.

We would anticipate that under HEW Regulations at 45 C.F.R. 85.5, HUD will adopt the enforcement and hearing procedures which it utilizes for the enforcement of Title VI of the Civil Rights Act of 1964. Nonetheless, in view of the lack of statutory standards prescribing sanctions for violation of Section 504, and the lack of any delegation of authority to FHEO for Section 504 enforcement, it would be improper at this time for your Office to institute formal enforcement proceedings (See letter from Chester C. McGuire to Rep. David E. Satterfield, III, dated April 13, 1978, attached hereto.)

This should not, however, be read as indicating that HUD currently lacks authority to review compliance with Section 504 through the conduct of investigations and informal compliance efforts. Likewise, in certain cases violations occurring prior to the effective date of HUD's Regulation may be subject to formal proceedings once the Regulation takes effect. On May 1, 1978, HEW issued a policy interpretation at 43 Fed. Reg. 18631, stating that HEW's Office of Civil Rights would investigate complaints of alleged discrimination occurring after the effective date of the Act but before the effective date of its Section 504 Regulation, if "those complaints charge violations of the statute which do not require for their resolution the interpretive language of the regulation." Thus, HEW would apply its Section 504 Regulation retroactively on a case-by-case basis, and would consider such discriminatory actions if proven to be violations of the statute. In view of HEW's lead agency role with regard to procedures and policies for Section 504 enforcement, we recommend that your Office apply the same guideline regarding the retroactivity of HUD's final Regulation.

/s/ Edward W. Norton

Acting General Counsel

Attachment

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOSTON REGIONAL OFFICE
ROOM 800, JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

REGION I

AUG 02 1979

IN REPLY REFER TO:

Gregory P. Beusing
Coordinator, Indian Task Force
Federal Regional Council of New England
Room E-431
JFK Federal Building
Boston, Massachusetts 02203

Subject: Narragansett Indian Land Managment Corporation

Dear Mr. Beusing:

We have reviewed the legislation entitled "The Narragansett Indian Land Managment Corporation Act" and supporting federal legislation. Our analysis of the state legislation which we believe answers all the questions you raised in your June 5, 1979 letter is as follows.

I. Does the Narragansett Indian Land Managment Corporation (Corporation) qualify as an Indian Housing Authority under 24 CFR 805.108?

HUD regulations at 24 CFR 805.108 state that an Indian Housing Authority (IHA) may be established either:

> "a) By a tribal ordinance enacted by exercise of a tribe's powers of self-government independent of state law, creating an IHA with all necessary legal powers to carry out low income housing projects for Indians . . .; or
>
> b)Pursuant to a state law which provides for the establishment of IHAs with all necessary legal powers to carry out low income housing projects for Indians."

A) The Narragansett Indians are not recognized by the Federal Government as being a tribe which has powers of self-government independent of state law and therefore cannot establish an IHA by tribal ordinance. The Corporation is a creation of state law; it was not established by tribal ordinance. The Corporation was formed by state law for quite limited purposes as specified in Section -4 - Purposes: "To manage and hold the real property acquired pursuant to the provisions of Sections 6(d) and 7 of this charter . . .." The General Powers set forth in Section 6 of the legislation do not in any significant manner, expand those limited powers. Moreover, Section 10 requires that 75% of the private land identified in the settlement agreement to be acquired pursuant to Section 6(d) may not be developed and Section 7 prohibits development of any of the public land to be granted to the Corporation by the state. In summary, therefore, the Corporation has the authority "to own, hold, clear, improve, develop and rehabilitate . . ." up to 25% of the (private) lands identified in the Settlement Agreement. The above general language might be interpreted to permit the Corporation to provide housing as part of "develop(ment)." Note, however, that "improvement" is defined in Section 2(b) and is limited in scope. However, to qualify as an IHA under HUD regulations, the entity created must have "all necessary legal powers to carry out low income housing projects for Indians." In the absence of explicit language in the statute creating the Corporation which meets those criteria, HUD would look to the state enabling legislation which authorizes the creation of city and town housing authorities, Rhode Island General Laws, Title 45, Chapters 25 to27.

II. Is the Corporation considered a housing authority under the Rhode Island enabling legislation?

To qualify as a housing authority under state law, the entity at a minimum would have to meet the definition of an authority appearing at 45-25-3(1) of the Rhode Island General Laws:

> "Authority of 'housing authority' shall mean a public body and a body corporate and politic, oranized in accordance with the provisions of chapters 25 and 26 of this title for the purposes, with the powers and subject to the restrictions hereinafter set forth."

The legislation which establishes the Corporation does not in any way reference or incorporate the provisions of chapters 25 and 26 of Title 45. Therefore we conclude that the Corporation does not qualify as a housing authority under the state enabling legislation and, accordingly, it does nto qualify as an IHA under HUD regulations.

III. Observations on the legislation establishing the Corporation relative to Amendments to create an Indian housing authority.

A) Because the Corporation was formed for a particular purpose, i.e., to settle a law suit, the actual legislation adopted is very limited in scope. The complementary federal legislation which was adopted specifies criteria which the state legislation establishing the Corporation is to meet (Section 7 of the Rhode Island Indian Claims Settlement Act). For these two reasons, we believe that it would be easier to adopt new legislation to create an IHA rather than to amend the existing legislation. Moreover, because the

Corporation has limited purposes, it does not appear to be an appropriate umbrella under which an IHA, created under new legislation, could operate. Amendments to the state legislation, particularly in regard to permitting the Corporation to own land in addition to the "settlement lands", might invite and/or requre amendments to the federal legislation.

B) Are IHAs created by state law subject to Titles VI and VIII of the Civil Rights laws?

Under the regulations at 24 CFR 805.105(b), HUD makes that determination on a case-by-case basis. HUD has now set forth in a memorandum dated June 5, 1979 from K.H. Sauerbrunn to Max Redding entitled "North Carolina State Indian Housing Authority" the type of analysis it uses in making that determination.

1) Federal Recognition
HUD has taken the position that if the Indian Civil Rights Act applies to the tribe, then Titles VI and VIII are preempted. To determine whether the Indian Civil Rights Act applies, HUD would ordinarily look to whether the BIA had granted federal recognition. If if has, then under the HUD regulations, the tribe can create an IHA under tribal authority.

2) Possible HUD Determination
If the BIA has not found that the tribe has sufficient self-governing powers to be granted federal recognition, HUD could review the evidence of self-governing powers and find the pwers to be in sufficient quantum, th enable HUD to determine that the tribe should be classified as a political entity. Then, in accordance with the interpretation of the Mancari case outlined in the memorandum, HUD could permit such an IHA, though formed under state law, to restrict occupancy to Indians on the grounds that such a practice does not constitute discrimination on racial grounds, since in such a case "Indians" are considered a political not a racial classification. It is highly unlikely, however, that in the absence of a BIA determination granting federal recognition that HUD could or would find sufficient powers of selfgovernment to enable it to classify the tribe as a political entity.

In addition to the analysis outlined in the memorandum there is some thinking that should there be insufficient evidence of self-governing powers, HUD might be able to permit an IHA formed under state law to restrict occupancy to Indians under a theory of the Bakke case. Under that theory, if HUD found a convincing history of invidious discrimination against the Indians in a particular state, finding, for example, that an IHA had to be created in order for Indians to be housed, HUD might be able to permit an IHA to restrict occupancy to Indians on the grounds that the restriction was an appropriate remedy to counter the history of discriminatory treatment of the Indians.

Sincerely,

Marvin H. Lerman

Marvin H. Lerman
Regional Counsel

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: 19 OCT 1979

IN REPLY REFER TO:

TO : Max G. Redding, Office of Area Counsel, 4.4G

FROM : K.H. Sauerbrunn, Regulatory Programs Division, GR

SUBJECT: North Carolina State Indian Housing Authority

The Office of Housing has raised the question of whether the statutory powers granted to the North Carolina State Indian Housing Authority are sufficient powers of self-government to qualify the housing authority as an Indian tribe within the meaning of the Indian Civil Rights Act. This question was not specifically addressed in our June 5, 1979 memorandum to your office in which we responded to your request for an opinion on whether Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601) and the Indian Civil Rights Act (25 U.S.C. 1301-03) apply to the North Carolina State Indian Housing Authority. In that memorandum we concluded that, since the North Carolina Indians are not Federally-recognized and do not possess powers of self-government, the North Carolina State Indian Housing Authority would be subject to the prohibitions against racial discrimination contained in both Title VI and Title VIII.

The Indian Civil Rights Act provides that "no Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The applicability of the Indian Civil Rights Act to the North Carolina State Indian Housing Authority is significant with respect to whether tenants of the Indian Housing Authority (IHA) can be exclusively Indians. If the Indian Civil Rights Act is applicable to an IHA, then Title VI and Title VIII are preempted and there would be no legal barriers to exclusive occupancy by Indians in housing projects operated by the IHA. However, if Title VI and Title VIII are applicable to the IHA, then the IHA may not exclude non-Indian tenants in their housing projects.

PREVIOUS EDITION IS OBSOLETE

The Indian Civil Rights Act applies to an *Indian tribe* in the exercise of *powers of self-government*. "Indian tribe" is defined to include groups of Indians "subject to the jurisdiction of the United States and recognized as possessing *powers of self-government*" (25 U.S.C. §1301; Indian Civil Rights Act §201(1)) (emphasis supplied). "Powers of self-government" is defined to mean and include "... *all governmental powers* possessed by an Indian tribe, executive, legislative, and judicial,..." (25 U.S.C. §1301; Indian Civil Rights Act §201(2)) (emphasis supplied).

The North Carolina State Indian Housing Authority was formed (under North Carolina General Statute 157-67) for the purpose of providing safe and sanitary dwelling accommodations for Indians of low income. The powers granted under the State law to the IHA are apparently similar to those generally granted to local housing authorities under State enabling statutes. For the purpose of this memorandum we assume that the North Carolina IHA satisfies the definition of a "public housing agency" under section 3(6) of the United States Housing Act of 1937, i.e., that it is a "...*governmental entity or public body*...which is authorized to engage in or assist in the development or operation of low-income housing." (Emphasis supplied.) We also assume for this purpose that the statutory powers of the IHA are sufficient for the development and operation of low-income housing under the HUD Indian Housing regulations (24 CFR Part 805).

Since the North Carolina IHA is a "governmental or public body," its powers and functions are in the nature of governmental powers. The IHA does not, of course, possess plenary powers of local government, including the executive, legislative and judicial powers. It does, however, possess all of the governmental powers necessary to carry out the housing function. The question, therefore, is whether Section 201(2) of the Indian Civil Rights Act is to be read as including only those Indian entities which have the full range of governmental powers or as also including those which have a sufficient range of governmental powers to carry out the more limited Indian public purposes for which they were created. There is nothing specific in the legislative history of the Indian Civil Rights Act to indicate the Congressional intent on this issue.

Since the issue of whether an Indian housing authority qualifies as an Indian tribe within the context of the Indian Civil Rights Act is a novel issue, and since this is an Act of more general applicability which HUD is not charged with interpreting, an opinion by this office would in any event not be conclusive. Accordingly, the Office of Housing has indicated and we agree that it would be preferable for the issue to be resolved in the first instance by a court in the context of an action for declaratory judgment or other appropriate relief.

K. H. Sauerh

Associate General Counsel
for Regulatory Programs

NOV 07 1979

1G

Mr. Gregory P. Buesing
Coordinator
Indian Task Force
Federal Regional Council of New England
Room E-431
JFK Federal Building
Boston, Massachusetts 02203

Dear Mr. Buesing:

This is in response to your letter of August 21, 1979 which raises two questions about HUD's position regarding the applicability of Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 ("Titles VI and VIII") to public housing sponsored by an Indian Housing Authority ("IHA") created by state legislation.

We stated in our August 2, 1979 letter to you that in accordance with the regulations at 24 C.F.R. 805.105(b) HUD makes a case by case determination of the applicability of Titles VI and VIII to IHA's established pursuant to state law. Should HUD find those provisions apply, occupancy which is limited to Indians is considered to constitute impermissible racial discrimination. On the other hand, if HUD finds that because of the amount of self-governing powers, the Indian Civil Rights Act (25 U.S.C. 1301-03) applies to a tribe, application of Titles VI and VIII to the tribe is pre-empted and occupancy of the housing may be limited to Indians on the ground that any restrictions on occupancy are due to a political, not racial, classification.

Your first question is whether under the HUD analysis an IHA created by state law which builds public housing on land set aside for the exclusive use of an Indian group can restrict occupancy to members of that group. Under the analysis presented, and irrespective of any land use restrictions, it is theoretically possible that on a case basis HUD could find that even though the IHA was created by state law, a tribe has sufficient powers of self-government, so that the Indian Civil Rights Law applies. If so, then Titles VI and VIII are pre-empted and any restrictions against non-Indians would not be considered to be a matter of prohibited racial discrimination. However, since HUD has no procedures for evaluating the self-governing powers of an Indian tribe, HUD relies on the determination of Federal recognition made by the Bureau of Indian Affairs. We have been informed by the General Counsel's Office that in the absence of such a BIA designation it is most unlikely that HUD would find that a tribe had sufficient powers of self-government to be subject to the Indian Civil Rights Act and exempt from Titles VI and VIII.

Secondly, should HUD determine that the state-created IHA is subject to Titles VI and VIII, the fact that the housing is located on land which in some way restricts use or occupancy to Indians is not determinative of the issue of restriction on occupancy of the federally-assisted housing. According to the HUD regulations at 24 C.F.R. 805.108 (b) "An IHA may be established...pursuant to a state law which provides for the establishment of IHA's with all necessary legal powers to carry out low income housing projects for Indians" (emphasis added). At a minimum, that provision requires the IHA to have the authority to conform to federal law, including the Civil Rights Laws. Furthermore, Part One of the Annual Contributions Contract between an IHA and HUD contains various provisions prohibiting discrimination in housing and the IHA is bound upon execution of that document regardless of any restrictions on the land.

Finally, a state public accommodations law itself might forbid occupancy restricted to any one group.

Your second question relates to HUD's legislative mandate for serving Indians. Following is an examination of the references made in HUD legislation relative to serving Indians.

A) CDBG

The Housing and Community Development Act of 1974, as amended, authorizes the Secretary at 42 U.S.C. 5303 to "make grants to...Indian tribes to help finance Community Development Programs..." The term "Indian tribe" is defined in the statute at 42 U.S.C. 5302(a)(16) as "...any Indian tribe, band, group, and nation,...which is considered an eligible recipient under the Indian Self-Determination and Education Assistance Act and the State and Local Fiscal Assistance Act of 1972." The implementing regulations at 24 C.F.R. 571.3(o) further specify that the Bureau of Indian Affairs will determine what constitutes an eligible recipient under the former act and the Department of Treasury will make that determination in regard to the latter Act. The BIA procedures for making that determination are set forth at 25 C.F.R. Part 54, and include a number of criteria to be considered. The State and Local Fiscal Assistance Act of 1972 at 31 U.S.C. 1227(4) sets forth the following criteria for determining if an entity qualifies as a tribe: "...an Indian tribe...which has a recognized governing body which performs substantial governmental functions..."

Inasmuch as the purpose of the CDBG program is to provide federal funds to assist in the development of communities, HUD must deal with entities which have some powers of self-government in order that the purpose may be accomplished.

B) Housing Act of 1949

In establishing the submission of a "workable program for community improvement" as a prerequisite to a contract for urban renewal funds, the legislation at 42 U.S.C. 1451(c) discusses submissions from a number of groups including from an "Indian tribe, band or nation." Again, since the purpose of the urban renewal program is to provide funding to assist in the physical development of communities, HUD must deal with an entity having some degree of control over its environment.

C) HUD Housing Programs

The Declaration of policy set forth in the Housing Act of 1937 at 42 U.S.C. 1437 sets forth both the purpose and the structure of the program when it states: "It is the policy of the United States to promote the general welfare...by employing...funds and credit...to assist the several states and their political subdivisions to remedy...conditions and the acute shortage of...dwellings for families of low-income..." At 42 U.S.C. 1437c(c) the legislation sets limitations on the total amount of contractual authority which HUD may enter into at various times and includes the establishment of minimum amounts to be allocated for housing for "families who are of any Indian tribe...which is recognized by the Federal Government...or who are wards of any state government..."

As set forth in the declaration of policy, the legislation is structured to provide funds to political entities to provide housing. The wording of the legislation establishing the amount of contractual authority does not grant additional authority or affect in any way the purpose or structure of the program, it simply sets limitations on HUD. The wording does not imply a legislative intent or commitment to house Indian families in a manner outside of the confines or structure of the program as established.

Moreover, the legislation sets the phrase..."families...who are wards of any state government" as the alternative to the phrase "families who are members of any Indian tribe...which is recognized by the federal government..." In that context we believe the former phrase must be interpreted as simply referring to Indians who are members of non-federally recognized tribes. In interpreting the phrase "wards of...state government...." we believe that states do have special responsibilities to Indian tribes due to their status as groups which formerly had or have some type of independent existence as functioning entities, but do not have any additional responsibilities to Indians as individuals.

Please also note that at 24 C.F.R. 805.101(a) explicit wording is provided to make clear that an individual Indian family may be accommodated in any housing provided under the program.

Based on the above examination we conclude that HUD's legislation does not set forth a particular mandate for serving Indians but rather establishes that qualified Indian tribes are eligible applicants for HUD assistance.

We hope this response is of assistance to you.

Sincerely,

Marvin H. Lerman

Marvin H. Lerman
Regional Counsel

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

SEP 10

MEMORANDUM TO: Sheldon B. Latham, General Deputy
Assistant Secretary for Fair Housing
and Equal Opportunity

SUBJECT: Title VI Compliance Plan for Brevard
County (Florida) Housing Authorities

This memorandum is in response to your request, dated June 8, 1979, for a legal opinion concerning several issues raised by proposed voluntary compliance plans submitted by the four Housing Authorities serving Brevard County, Florida. The plans are intended to correct the racial identifiability of project sites in the Authorities by consolidation of their tenant applicant pools and the revision of procedures for the selection and assignment of new tenants. The plans would also provide for the transfer of existing tenants within an Authority to projects where their race does not predominate.

You have asked (1) whether under the circumstances presented, HUD is obligated to provide funds to housing authorities for the transfer of tenants; (2) whether HUD is authorized to use program funds for such purposes; (3) what facts would justify the provision of such assistance; and (4) whether HUD may require the Housing Authorities in question to adopt tenant selection and assignment plans requiring each Authority to draw from application pools across community lines.

Neither Title VI nor HUD's regulations and policies issued thereunder impose any requirement on the Department to provide financial resources to enable housing authorities to transfer tenants in order to alleviate segregation of project sites. The fact that HUD's prior policies or its actions or inactions may arguably have contributed in part to the racial identifiability of project sites would not alter this conclusion.

The use of HUD funds for the purpose described above must be based upon statutory authorization. The statute authorizing operating subsidy funds for the Public Housing program is the only potential authority we have been able to identify.

Since the Annual Contributions Contract requires compliance with Title VI without regard to the date that a project was placed under the Contract, operating subsidies provided by HUD are available for the cost of relocating families to meet Title VI requirements on the same basis as any other cost of operation.

As you have noted, determining whether and under what circumstances to allocate additional HUD funds for these purposes would be a policy matter to be decided by the appropriate program officials. In our opinion, the strongest case for making such funds available would be in a situation where tenant transfers are the only feasible mechanism for achieving substantial desegregation of project sites in an Authority which did not have any other funding available for such use.

Requiring the use of cross-jurisdictional tenant application pools as a method of achieving compliance with Title VI would be consistent with both the objectives of Title VI and with the Department's general approach toward interjurisdictional matters involving housing authorities. For example, in the context of Section 8 Existing Housing HAP Contracts, HUD will not, in the absence of a contrary state statute, state attorney general's opinion, or controlling judicial determination, review a PHA's decision that it may enter into HAP contracts beyond the PHA's jurisdiction.

It should be noted that PHA's may voluntarily agree to accept tenant applications from beyond their jurisdictions, subject to restrictions, if any, in relevant state statutes. It is our belief that as a general rule the use of such cross-jurisdictional application pools by PHA's would not be restricted by state law.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

HUD-96 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: 3 JUL 1979

IN REPLY REFER TO:

TO : Weldon Latham, General Deputy
Assistant Secretary
Fair Housing and
Contract Compliance, EC

FROM : K.H. Sauerbrunn, Regulatory Programs, GR

SUBJECT: Title VIII Complaint No. 05-78-09-406-200, Leadership Council for Metropolitan Open Communities v. Village of Oak Brook, Illinois

This memorandum is in response to Kenneth Holbert's request for an opinion concerning the standing of the Leadership Council to file a complaint as a "person aggrieved" under Section 810(a) of the Fair Housing Act (42 U.S.C. 3610(a)). The complaint states that "Zoning which excludes multi-family, rental units effectively bars low income housing, thus discriminating disproportionately against blacks and other minorities."

At the outset, please note that the Secretary's authority to investigate the Leadership Council's complaint has not expired even though several months have passed since the complaint was filed. Section 3610(a) and the regulations issued thereunder at 24 CFR 105.21(a), directing the Secretary to investigate complaints within 30 days after receipt, do not limit the Secretary's authority to investigate a complaint after the 30 day period has run. On the other hand, the complainant may be barred from commencing a civil action under Section 3610 since more than sixty days have passed since its complaint was filed.

In his letter to the Regional Administrator dated January 4, 1979, the attorney for the Village of Oak Brook asserts that considerations of standing, as discussed by the federal courts, are "relevant in the evaluation of injury under section 810," and cites Evans v. Lynn, 537 F.2d 571 (1975) as support for his claim that the Leadership Council has failed to demonstrate the existence of an injury sufficient for it to qualify as a "person aggrieved" under Section 3610(a).

We are of the opinion, since the Leadership Council is a person under Title VIII and has alleged action which could constitute a discriminatory housing practice, that HUD processing and investigation of the complaint is not precluded. However, in light of the matters raised by the respondent, any investigation should focus on documenting whether the Leadership Council is a proper party and whether injury has occurred or is about to occur.

The following review of judicial precedents in the area of standing may be helpful in investigating this matter and other similar cases:

> The courts have held that:
>
> ...a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practice harms him, and that he personally would benefit in a tangible way from the court's intervention. *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975)

An organization such as the Leadership Council may have standing in its own right, or in the absence of injury to itself, may have standing as a complainant solely as the representative of all or some of its members who are persons aggrieved. (422 U.S. at 511.)

The mere fact that an organization is actively involved in fair housing and exclusionary zoning issues is not sufficient to confer standing in the courts. *Village of Bellwood, et al.* v. *Gladstone Realtors, et al.*, 569 F. 2d 1013, 1017 (7th Cir. 1978), *aff'd on other grounds* at 47 U.S.L.W. 4377 (April 17, 1979).

If the Leadership Council represents any individuals, whether members or non-members, who do not reside in Oak Brook and who could demonstrate that they have been denied an opportunity to live in Oak Brook specifically because of the zoning ordinance, the Leadership Council would have standing to file a complaint on their behalf. See, e.g., *Planning for People Coalition* v. *Du Page* (N.D. Ill. No. 71 C 587, *Dec'd* Feb. 4, 1976). Likewise, if the Leadership Council represents any Oak Brook residents, its standing could be predicated on the injuries they have suffered in terms of loss of the social and professional benefits of living in an integrated community. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972); *Bellwood, et al.*, *supra* at 47 U.S.L.W. 4387.

On the basis of the above, before making a determination to resolve this complaint it will be necessary to document the status of the Leadership Council and the specific injuries alleged to have been suffered by the Leadership Council or those individuals whom the Council is representing in this proceeding.

The Leadership Council's complaint appears to attack the discriminatory effect of Oak Brook's zoning ordinance in general rather than a specific discriminatory act. You may wish to consider referral of this matter to the Attorney General for enforcement under Section 3613, particularly if your investigation confirms that the Council's complaint is general in nature.

Finally, the Leadership Council has made allegations with respect to the U. S. Department of Transportation grant to Oak Brook for street improvements. While Section 3608(d) of the Act, requiring all executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of the Act, may be relevant to the DOT grant, Section 3610 is not. However, if this case is referred to the Attorney General, the grant application may be relevant to consideration of the existence of a pattern or practice and to any judicial proceedings under Section 3613.

WK for KS

Associate General Counsel

Sterling Tucker, Assistant Secretary
Fair Housing and Equal
Opportunity, E

SEP - 7 1979

Jane McGrew, General Counsel-Designate, G

Minority- and Women-Owned Business Enterprise in the Public Housing Modernization Program - Request for Legal Opinion

This is in response to your request for a legal opinion concerning the authority of the Department to impose regulatory requirements concerning the utilization of minority- and women-owned business enterprises in the Public Housing Modernization Program. Essentially, your proposal would require Public Housing Authorities (PHAs) to submit a plan for the utilization of minority- and women-owned businesses as a part of final applications for public housing modernization projects.

We are of the opinion that this proposal is legally permissible and consistent with Presidential and Departmental efforts to increase utilization of minority- and women-owned businesses.

By memorandum of October 27, 1977 (copy attached) this office urged the development of an institutionalized system designed to increase minority business participation in all HUD programs that would be effective in every region and area. In concluding that a HUD goals oriented enterpreneurship program would be upheld if challenged, we indicated that such a goals system would be within the spirit of Executive Order 11625 and could be tailored to the accomplishment of HUD programmatic goals.

E.O. 11625 prescribes arrangements for developing a National Program for Minority Business Enterprise. Section 3(e) of the Order directs each Federal department and agency to continue efforts to foster and promote minority business enterprise. In creating a National Women's Business Enterprise Policy in Executive Order 12138 the President also has directed Federal departments and agencies empowered to extend Federal financial assistance to issue regulations requiring recipients to take appropriate affirmative action in support of women's business enterprise. Further, the President, in his Message to Congress on the National Urban

Policy of March 27, 1978 (copy attached) stated the important role minority businesses have in the economy and the private sector economic base of cities and committed all Federal agencies to the development of goals and timetables for minority participation in their programs. As you have indicated, under the President's policy, Secretary Harris has established a minority business participation program for HUD direct and indirect contracting activities.

Based upon our review of legal authorities and the policy of furthering entrepreneurial opportunities we support the revisions to the HUD Modernization Program Regulations in your August 29, 1979 memorandum to Assistant Secretary Simons.

We note that while one of the purposes of the revision to the Modernization Program Regulation is to reflect a commitment to the achievement of Departmental goals the regulation does not state the Departmental or program goal for the utilization of minority- and women-owned businesses in the Modernization Program. We believe that inclusion of a numerical or percentage goal for the program would provide guidance to PHAs as to the extent of utilization expected in the program and provide HUD Area Office staff with a touchstone for review and monitoring of plans submitted. We recommend that consideration be given to including a program goal within the regulations.

Jane McGrew

General Counsel-Designate

Attachments

READEX FICHE best copy available

27 DEC 1979

MEMORANDUM TO: Donna Shalala, Assistant Secretary
for Policy Development
and Research

FROM : Jane McCrew

SUBJECT : Women's Business Enterprise

This is in response to your request for guidance concerning HUD's authority to promote expanded opportunities for women-owned business enterprises in Departmental programs and activities through affirmative action requirements.

We believe that, in addition to outreach efforts, there are a number of opportunities available to the Department for the promotion of women-owned businesses which are legally permissible and consistent with efforts of the President and the Department to increase the utilization of women-owned businesses.

On May 18, 1979, the President signed Executive Order 12138 creating a National Women's Business Enterprise Policy. The Order directs Federal departments and agencies to develop and implement plans providing for a greater role for women business owners in agency programs and activities and to cooperate with the Interagency Commission on Women's Business Enterprise.

Section 1-1 of the Order is entitled "Responsibilities of the Federal Departments and Agencies," and subsection 1-101 of that section prescribes responsibilities which are to be exercised "within the constraints of statutory authority and as otherwise permitted by law." Subsections 1-101(a) and (b) make each department and agency responsible for taking appropriate action to ensure full participation by women in the free enterprise system and direct each department and agency to take affirmative action in support of women's business enterprise in appropriate programs and activities. Also, subsection 1-101(c) of the Order mandates those departments or agencies empowered to extend Federal financial assistance to any program or activity to issue regulations requiring the recipient of such assistance to take appropriate affirmative action in support of women's business enterprise. Such regulations should also prohibit actions or policies which discriminate against women's business enterprise on the ground of sex and prescribe sanctions for non-compliance. Appropriate affirmative action may include the creation or support of new programs designed to meet the special needs of women's business enterprise and the establishment of incentives to promote business or business-related opportunities for women-owned firms. However, the Order provides that numerical set-asides or similar measures to implement the Order shall not be imposed unless the agency or department states the purpose of the measure, the factual findings of discrimination against women's business enterprise and the need for such measure.

Section 1-103 provides that in carrying out their responsibilities under Section 1-1, "the departments and agencies shall consult the Department of Justice, and the Department of Justice shall provide legal guidance concerning these responsibilities." The Department of Justice is currently studying the Executive Order and the responsibilities of departments and agencies thereunder. We understand that the Department of Justice is specifically reviewing the basis for imposition of set-asides and similar measures in affirmative programs and, pursuant to its authority under the Order, will provide guidance regarding the justification necessary for their imposition. Until this guidance is received we believe it would be inappropriate for the Secretary to attempt to publish regulations which employ a set-aside system for increasing women-owned business opportunities.

The Order is unclear as to what measures other than set-asides require factual findings of discrimination prior to implementation. Findings of discrimination have been considered essential to affirmative action programs which would by their terms exclude other businesses from competing for certain awards. However, we do not interpret the restriction on the use of numerical set-asides or similar measures to preclude the use of other institutionalized means to encourage women-owned businesses, provided such means do not deny the opportunity for all other businesses to participate in HUD programs and activities. For example, it would be appropriate to assess the availability of women-owned businesses in relation to all firms in particular fields and to require good faith efforts to assure commensurate participation by the women-owned businesses in a program or activity, including grants and contracts, perhaps by setting percentage goals for participation. Since this approach would be designed to assure the equitable distribution of opportunities for participation in HUD programs or activities, and to increase participation by women-owned businesses, it could be implemented without specific findings of past discrimination.

Our review of HUD statutes has not identified any statutory authority providing for special consideration to be accorded to women-owned businesses.[1] However, in light of the Executive Order, specific legislative authority is not essential to efforts designed to enhance women-owned business opportunities in HUD programs and activities.

The Secretary of HUD has in the past utilized the legislative authority to administer HUD programs to impose requirements on recipients of HUD funds for purposes consistent with the policies of the President for aiding disadvantaged entrepreneurs. For example, HUD program authority is being utilized to encourage increased utilization of minority business enterprises. Executive Order 11625 requires Federal departments and agencies, in cooperation with the Secretary of Commerce, to take appropriate action to promote minority business enterprise participation in Federal programs. Consistent with the Executive Order the Department continues to promote a Minority Bank Deposit Program through the use of special training and information programs and a goals-oriented plan to increase utilization of minority owned or controlled financial institutions. Also, the extent to which minority entrepreneurs will benefit from contracts has been used as a factor for award in HUD negotiated procurements. Other measures to promote minority business opportunities in HUD programs are being developed and it is possible that many of these efforts also will involve goals-oriented systems to assure satisfactory performance.

Executive Order 12138 is based on the recognition that women-owned firms face many obstacles, that there is a need to aid and stimulate women's business enterprise and that small businesses and women entrepreneurs can make significant contributions towards innovation, full employment and balanced growth in our economy. These findings were also stated in the President's May 16, 1979 Memorandum for the Heads of Executive Departments and Agencies.

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[1] In our analysis, we have also considered Section 3 of the Housing and Urban Development Act of 1968 which directs the Secretary to assure that, to the maximum extent feasible, employment opportunities and contracts for work on projects in HUD programs relating to housing and urban development be awarded to individuals and businesses "located in or owned in substantial part by persons residing in the area of such projects." HUD, in implementing Section 3, has provided that businesses can be eligible for participation in this program if they are owned or controlled by persons considered by the Small Business Administration (SBA) to be socially or economically disadvantaged. The SBA has under its Section 8(a) program interpreted "socially and economically disadvantaged" to include several minority groups, but has not interpreted the terms to include women-owned businesses. (15 U.S.C. §637(a)). Although a Section 3 program could be established to assist women-owned businesses, the focus of the legislative history and the Department's regulation (see 24 CFR 135.5) tend to constrain the Department's authority to use Section 3 in a manner to require a significant increase in the use of women-owned businesses.

In carrying out Executive Order 12138, HUD can exercise its statutory authorities to implement programs in a manner that stimulates women's business enterprise since it is in the interest of the United States to promote full employment and balanced growth in our economy. Moreover, such an approach will help to assure that recipients of federal aid are in compliance with the President's objective of facilitating, preserving and strengthening women-owned business enterprise and encouraging full participation by women in the free enterprise system. In taking this approach, however, HUD must take into account the nature of the specific programmatic authority involved and the extent to which the agency may prescribe limitations on the eligibility of program recipients to participate. For example, a plan to aid women-owned firms in competitive programs such as Assisted Housing can be more directive in its requirements than one in entitlement programs such as the Community Development Block Grant Program. Of course, where direct contracting is undertaken the Department must comply with the terms of the Federal Procurement Regulations promulgated by the Office of Federal Procurement Policy. Recently, proposed revisions to these regulations providing for affirmative action efforts in the area of Federal contracting were published in the Federal Register for comment (44 F.R. 62091, 10/29/79). These regulations are designed to set overall goals for increased women-owned business participation in Federal contracting programs.

My office will be pleased to assist you in formulating affirmative action plans to aid women's business enterprise, tailored to specific HUD programs.

Jane McGrew

General Counsel

DEC 11 1979

TO : Joseph Vera, 1E

DATE:

IN REPLY REFER TO:

1G

FROM : Marvin H. Lerman, 1G

SUBJECT: BHA Disclosure of Compliance Information to FH&EO Under Mass. Gen. Laws Ann. Ch. 66A.

This refers to your memorandum which attached a November 6, 1979 letter from Attorney Paul Yee of the BHA, in which Mr. Yee requested a legal opinion regarding the authority of the HUD Regional Office of FH&EO to obtain data from the BHA concerning the name, race and job title of BHA employees and the ability of the BHA to disclose that data to FH&EO under Mass. Gen. Laws Ann. ch. 66A, the State Fair Information Practices Act. We understand from discussion with Luis Rodriguez of your office that FH&EO has been conducting an investigation of certain BHA employment practices to determine compliance with the EEO contract clause, section 304 of the ACC, Part Two, as well as with section 109 of the Housing and Community Development Act of 1974, 42 USC 5301 et seq., and that the requested information is pertinent to those investigations. We further understand that to date Mr. Yee has taken the position that the BHA may not provide HUD with the requested information on the grounds that disclosure may or would be prohibited by Chapter 66A.

It is our opinion that FH&EO is authorized to obtain the requested information pursuant to section 109 of the Housing and Community Development Act of 1974, the United States Housing Act of 1937, as amended, and the Supremacy Clause of the United States Constitution, and that the BHA may disclose that information to FH&EO under Chapter 66A. You should accordingly direct Mr. Yee to provide the requested information immediately to your office, and inform him of the sanctions available in the event that your directive is not followed.

The information sought by FH&EO was requested in part pursuant to HUD responsibilities under section 109 of the Housing and Community Development Act of 1974, which prohibits discrimination "under any program or activity funded in whole or in part" with HUD CDBG funds. 42 USC 5309. In connection with section 109, the HUD Secretary has promulgated nondiscrimination regulations which define "program or activity" as "any function conducted by an identifiable administrative unit of the recipient, or by any unit of government or private contractor receiving community development funds or loans from the recipient." 24 C.F.R. 570.601(a). The HUD Secretary has also ruled that the discriminatory actions prohibited under section 109, whether directly or through contractual or other arrangements, include employment practice. 24 C.F.R. 570.601(b)(vi). We have been advised by Mr. Rodriguez that the BHA has contracted with the City of Boston to receive CDBG funds and that on this basis, FH&EO is investigating the BHA's employment practices to determine compliance with section 109. Since the information requested would be used as part of that investigation, we feel that the request is a valid exercise of HUD's authority pursuant to federal statute and regulation.

FH&EO has also requested the subject information for purposes of a compliance investigation under section 304 of the ACC, Part Two. HUD's authority to enter into ACC's with PHA's is prescribed by the United States Housing Act of 1937, as amended, 42 USC 1437. It is well established that the federal government has discretionary authority to establish the terms and conditions upon which it agrees to disburse funds, barring any controlling constitutional prohibitions. See King v. Smith, 392 U.S. 309 (1968). HUD has accordingly included section 304 prohibiting employment discrimination as a standard clause in its ACC's with PHA's. Section 304(D) provides explicitly that a PHA must furnish HUD with such information as it requires in order to supervise compliance under section 304.

In addition to the fact that FH&EO's request for information is a valid exercise of HUD authority, a denial of that request on the grounds that Chapter 66A prohibits such disclosure would pose a problem under the Supremacy Clause, Article VI, Clause 2 of the United States Constitution.

Refusal by the BHA to disclose data relating to its employees would undermine and frustrate FH&EO's effort to determine whether or not there has been compliance with the explicit Congressional mandate of nondiscrimination contained within section 109. Since a clear obstacle would thereby be created to the purpose and objective of that Congressional enactment, there would be a conflict between Chapter 66A and the federal law, and under the Supremacy Clause, Chapter 66A would have to yield. See *Jones* v. *Rath*, 430 U.S. 519 (1977); *Merrill Lynch, Pierce, Fenner and Smith v. Ware*, 414 U.S. 117 (1973). Accordingly, if Chapter 66A were understood to impose restrictions on a federal agency's ability to obtain information in the valid exercise of powers authorized by federal law, pre-emption would apply, and those restrictions would be null and void.

The proper apporach, however, where there is an apparent conflict between federal and state law, is to examine both statutory schemes and where possible reconcile their operation so as to avoid pre-emption. See *Merrill Lynch*, *supra*; *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Governor of Maryland* v. *Exxon Corporation*, 370 A.2d 1102 (1977), *affirmed* _____ U.S. _____, 98 S.Ct. 2207 (1978). It is therefore appropriate to determine whether and to what extent there is an actual or necessary conflict between Chapter 66A and federal requirements.

Chapter 66A, section 2 provides that any agency which collects, uses, maintains or disseminates personal data shall

> (c) not allow any other agency or individual not employed by the holder to have access to personal data unless such access is authorized by statute or regulations which are consistent with the purposes of this chapter or is approved by the data subject whose personal data are sought if the data subject is entitled to access under clause (i)....

"Agency" is defined by section 1 to mean

> any agency of the executive branch of the government, including but not limited to any constitutional or other office, executive office, department, division, bureau, board, commission or committee thereof; or any authority created by the general court to serve a public purpose, having either statewide or local jurisdiction.

The definition of "agency" does not specify whether the statute's coverage extends to executive agencies of both state and federal government or is limited to state government agencies. Moreover, the exception stated in section 2(c) for situations in which "access is authorized by statute or regulations which are consistent with the purposes of this chapter" is not explained anywhere in the statute.

Under the state Department of Community Affairs' rulemaking authority set forth in section 3 of Chapter 66A, the DCA has promulgated regulations to implement the purposes of Chapter 66A. (See attachment #1). Those regulations, which cover PHA's although they do not address the particular concerns of PHA's as distinct from other entities, provide an exception to the general rule restricting data access for access which "is authorized by statute or regulation", without further qualification. (751 Code Mass. Regulations sec. 7.03 (2)(c)). Relying on this exception, and based on the analysis set forth above of HUD's authority for its information request, we feel that the subject request would be exempt from Chapter 66A's prohibitions.

We further understand that new regulations have been prepared recently by the DCA which would clarify the obligations of PHA's under Chapter 66A and supersede the current regulations in that respect. (See attachment #2). At section 34.05 (7)(e)(4) of the proposed regulations, an exception is stated for "the U.S. Department of Housing and Urban for the purpose of carrying out powers conferred by Law". These regulations have already passed through the public comment period and are expected to be promulgated in the near future. It is likely that section 34.05 (7)(e)(4) was included in recognition of the federal rights of pre-emption over any conflicting state statute.

It thus appears from the terms of Chapter 66A and the current DCA regulations that an interpretation prohibiting the disclosure of personal data to a federal agency validly exercising powers authorized by law is not necessary. The proposed DCA regulations reinforce that view. Given that Chapter 66A can operate in consonance with the federal nondiscrimination law without actual conflict, the question of pre-emption would not have to be reached.

To conclude the foregoing, HUD FH&EO has authority under the Housing and Community Development Act of 1974, the United States Housing Act of 1937, as amended, and the Supremacy Clause, to obtain the subject information, and the BHA may disclose that information under

Mass. Gen. Laws Ann. Chapter 66A. In the event that the BHA refuses to furnish FH&EO with information required for the supervision of compliance under section 304 of the ACC, it may be found to be in "substantial default" or "substantial breach" of the ACC pursuant to sections 506 and 507 of the ACC, Part Two, the sanctions for which include: (1) delivery of possession to the Government; (2) conveyance of title to the Government (in the case of a substantial default); (3) an action by the Government for specific performance or injunctive relief; and (4) suspension or termination by the Government of the ACC. Sections 501, 502, 508, and 509 of ACC, Part Two. The sanctions available to HUD for failure by the unit of general local government CDBG recipient (the City of Boston) to comply with the nondiscrimination requirements of section 109, whether directly or indirectly, include referral to the Attorney General for institution of appropriate civil action, Secretarial action on payments, or other action authorized by law. See 42 USC 5309; 24 C.F.R. 570.912 and 570.913.

Please feel free to contact us if there are any further questions or problems regarding this matter. If you wish to make this opinion available to Mr. Yee, you may do so.

Marvin H. Lerman

Regional Counsel

Attachments

PUBLIC AND LOW INCOME HOUSING/INSURED AND LOAN HOUSING PROGRAMS

Donald J. Dirksen, Director, Office of
Regional Housing, 8H

July 23, 1979

8G

Jack B. Toll, Office of Regional Counsel, 8G

Cass County Housing Authority Real Property Tax Issues

This is in response to your memorandum dated July 5, 1979, requesting an opinion relative to certain real property taxes which have been assessed against the Cass County Housing Authority.

Housing Authority property, in North Dakota, is exempt from all taxes and special assessments. North Dakota Statute 23-11-29 provides in part:

> "The property of an authority . . . is declared to be public property used for essential public and governmental purposes and shall be exempt from all taxes and special assessments of the City, the County, the State, or any political subdivision thereof."

In addition to this exemption, the North Dakota Statute as 23-11-28 exempts the Authority real property from levy and sale.

Clearly, Authority real property may not be taxed and may not be sold for non-payment of taxes. However, these same North Dakota Statutes provide that the Authority may make payments in lieu of such taxes or special assessments for improvements, services, and facilities furnished for the benefit of an Authority housing project. See NDCC 23-11-29.

It is my conclusion that the taxes assessed by the City of West Fargo, and the special assessment of the City of Casselton are in conflict with North Dakota law as well as established case law. Ferch v. Housing Authority of Cass County, 79 ND 764, 59 NW 2d 849.

All documents submitted for review and a copy of applicable North Dakota law is attached to this memorandum. Should you have any questions, please contact Ralph Gonzales of my staff who has done this research.

Jack B. Toll
Regional Counsel

Attachments

August 7, 1979

7.1G:DL

Mr. Joe M. Bogle, Jr.
Assistant City Attorney
Department of LAW
City Hall - Thirteenth Floor
455 North Main Street
Wichita, Kansas 67202

Dear Mr. Bogle:

The following comments are made in response to your letter of July 20, 1979, addressed to Mr. Thomas S. Kilbride, Area Manager of the Kansas City Area Office wherein you sought HUD's legal opinion concerning Wichita LHA Resolutions 187 and 188.

The legal division of the Kansas City Area Office has taken the position that the Area Office's Assisted Housing Management Branch has an ongoing responsibility to monitor and review the Housing Authority's policies concerning new and continued occupancy, as well as review substantive changes to the lease utilized in connection with the public housing program.

Resolution 187 in our opinion is vague and ambiguous from the standpoint of implementation. This particular resolution does not outline the consequences which a tenant faces if he chooses not to enroll in the assistance program. The implication, however, is that existing occupancy may be terminated and new occupancy may not be granted unless the tenant enrolls in the program.

Resolution 188 was passed July 12, 1979, in order to clarify the questions raised under Resolution 187. Clearly, the Wichita LHA intends to terminate leases of families who do not enroll in the program. Also, the LHA intends to deny occupancy to new tenants who do not enroll. The LHA has taken the position, however, that after proper enrollment, the "tenant will not have his lease agreement terminated for failure to participate and/or complete the Individual Assistance Program."

We are of the opinion that policy adopted by the passage of Resolutions 187 and 188 contravenes HUD regulations and the Annual Contributions Contract.

The regulations state at 24CFR 866.4(1)(1):

> "The PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in 866.4(f) or for other good cause." (underscore supplied)

The Wichita LHA has not stated whether it intends to make the mandatory enrollment policy a provision of the lease. If the policy is incorporated as a requirement in the public housing lease, HUD shall have an opportunity to review the lease. We are of the opinion, in light of 24CFR 866, that failure to enroll in the assistance program would not constitute adequate cause to terminate a lease under the public housing program.

See also Part II of the Annual Contributions Contract where it is stated at Section 203(b) that:

> The Local Authority shall not permit any family to occupy a dwelling in any project except pursuant to a written lease for such dwelling executed by a responsible member of such family, which lease shall contain all relevant provisions necessary to meet the requirements of the Act and of this contract, and which lease shall provide that the Local Authority shall not terminate the tenancy other than for violation of the terms of the lease or other good cause. In terminating a tenancy, the local Authority shall inform the tenant in a private conference or other appropriate manner the reasons for the eviction and give the tenant an opportunity to make such reply or explanation as he may wish. (underscore supplied)

As stated above, we do not believe the LHA can terminate a tenancy without good cause and we are of the opinion that failure to enroll in the assistance program does not constitute good cause.

The policy in our opinion continues to be confusing. A tenant who is required to enroll in the program can reasonably conclude that he is required to participate even though this is not the case.

If you have any further questions concerning our position in this matter, please contact Doug Loos at Area Code 816/374-4357.

Sincerely,

William G. Nichols

William G. Nichols
Area Counsel

AUG 1 4

Clyde McHenry, Deputy Assistant Secretary
for Public Housing and
Indian Programs, HG

Attention: Jack VanNess

Robert S. Kenison, Urban Development Division, GU

Resale and Demolition of Homeownership Units, South Bend, Indiana
Project No. IND 15-6

This is in response to your memorandum of March 21, 1979, forwarding a memorandum received from the Indianapolis Area Office, which raises several legal questions concerning the proposed sale and demolition of Homeownership Units in South Bend, Indiana.

We will respond to your questions in the order in which they were presented:

1. *Is it possible for Low-Rent Public Housing Homeownership units to be "condemned and sold" pursuant to State or federal agency's initiative, in this case, the Indiana State Highway Department?*

   In the *State of New Jersey* v. *Housing Authority of the City of Paterson, et al.*, U.S.D.C., N.J., No. 1206-70, the Court ruled that the State did not have authority to condemn the property. The Court "determined that the said property is part of a system aimed at furthering a National Purpose to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low-income, which purpose will be handicapped by the Plaintiff's condemnation." In this case there was no federal aid involved. [See *La Raza Unida of Southern Alameda County et al.*, v. *Volpe*, USCA 9th Cir., 1973, a copy of which is attached hereto].

   It is, therefore, the position of the Department that an involuntary taking of public housing land by a State is precluded by Federal supremacy. In addition, absent HUD's consent, a project may not be condemned by an agency of the State because of the Federal interest as defined in the ACC and Declaration of Trust.

If a portion of a low-rent housing project is necessary for the purposes of a federally assisted highway, we believe that under Sections 107(d) and 317 of Title 23, United States Code, Congress has authorized the Secretary of Transportation to negotiate with the Secretary of Housing and Urban Development for the acquisition of the property.

This Department does not normally oppose acquisition of low-rent housing for federally assisted highway purposes, but it is the legal position of the Department that the measure of compensation must be based on the cost of providing adequate substitute facilities for the property taken and the amount of severance damage to the remaining property. The usual standard of fair market value would not be the proper measure of compensation since public housing is not bought and sold in the private market and since the continuing need requires its replacement. There is considerable authority to the effect that where the courts have allowed the condemnation of project units of property already devoted to a public purpose, compensation has been based on the cost of providing adequate substitute facilities for the property taken.

The substitute facilities may be provided by moving the existing units to an acceptable site, by the acquisition of suitable existing units to be conveyed to the authority, or by providing new units.

2. Should the proposed action be contested knowing that such an initiative may leave the units isolated in an area that has been cleared, thereby reducing the value they would have as habitable dwelling units?

The decision whether to contest the action would be based on administrative considerations, such as effect of the highway on remaining dwelling units, as well as the factors discussed above. In any event, the measure of compensation must be based on the cost of providing substitute facilities. If the effect of the condemnation would be to leave some units which would be adversely affected, severance damages would be required. On the other hand, you may wish to insist that all units be taken and adequate substitute facilities provided. Of course, if no Federal funding is involved you may wish to oppose the condemnation of project units entirely.

3

3. Must relocation payments be provided the present "homebuyers" as if they were "homeowners?" If comparable replacement of the units elsewhere is required, how will compensatory payments for the Fair Market value of the properties be made?

42 U.S.C. Section 4601(6) defines a "displaced person" as any person who, on or after the effective date of this Act [enacted January 2, 1971], moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance. [Emphasis ours.] [See Alexander et al. v. HUD et al., Sup. Ct. of U.S. Nos. 77-874 and 77-1463 decided April 17, 1979, a copy of which is attached hereto].

In the instant case, the Indiana Highway Project FM-ST090(1) is a State project receiving no Federal assistance. Therefore, relocation payments pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act would not be applicable in this case. It is possible, however, that under Indiana law, there may be an obligation to provide relocation payments in instances where Federal assistance is not available.

Assuming the Uniform Act is not applicable, the obligation to provide replacement housing should be applied in such manner as to place the Homebuyers in a comparable position in a new home. Moving costs and costs of temporary relocation could be borne by the PHA, assuming no state benefits are available to meet these costs.

Should the Highway Project receive Federal funding, although participants in the Homeownership Opportunities Program could be considered "owners" under HUD regulations (See 24 CFR Section 42.90(b)(2)), the applicable regulations in determining the rights of owners would be those of the Department of Transportation. Hence, we cannot express an opinion as to what rights they might have, if any.

In any event, the rights of the Homebuyers should be protected by assuring that they are joined in any condemnation action together with the Housing Authority and their respective interests in the property determined by the Court.

4. What should the Area Office's official position be in terms of recovering its financial investment (i.e., appraisals)?

The position should be that appraisal and any other costs arising out of the taking should be borne by the acquiring agency and included in any condemnation award.

We will be able to furnish more specific advice if we are furnished a statement of the facts and issues in greater detail.

/s/ Joseph F. Gelletich

for Associate General Counsel

AUG 21 1979

MEMORANDUM FOR: Lawrence B. Simons, Assistant Secretary
for Housing-Federal
Housing Commissioner, H

SUBJECT: Public Housing -- Indian Claims Exception to Title Policies

The purpose of this memorandum is to summarize points that should be considered in responding to requests from the Field for authorization to accept Indian claims exceptions in title policies for public housing projects. The Columbia, South Carolina area office has recommended approval to proceed with projects in Fort Mill and Rock Hill, South Carolina, in an area subject to claims of the Catawba Indians under the Indian Non-Intercourse Act of 1790. Lawyers Title Insurance Company writes title insurance on land subject to Indian claims in South Carolina, but the form of title policy used by the title company in South Carolia includes the following exception from coverage:

> "Any right or claim, including, but not limited to, any right of possession or claim for damages relating to the land, which has or may be asserted, of record or not, by or on behalf of any Indian or Indian tribe arising out of any treaty or out of the Indian Non-Intercourse Act of 1790 or any similar state or federal law. The foregoing, notwithstanding, the Company hereby insures the insured against loss or damage not exceeding the amount of the policy, insured [sic] by reason of the insured being actually evicted from possession of the land due to the enforcement of a decree of any court or competent jurisdiction in a suit asserting such right of possession on behalf of an Indian tribe. However, such insurance is entirely conditioned upon the insured, at its sole expense, paying all court costs and attorney's fees for an attorney acceptable to the company to defend any such suit against the insured and any appeals hereof."

1. Public Housing Land Title

There is no statutory or regulatory provision specifying the quality of title that will be acceptable for development of a public housing project, or the nature of the exceptions that may be included in the title policy. The Annual Contributions Contract provides that a PHA must acquire "good and valid title" to a project site (ACC, Part II, Section 103(E) and (F)). Generally, the title to public housing land should be consistent with the "marketable title" standard -- the quality of title that would be required by an informed and prudent purchaser. There is no requirement, however, that the Department comply with the precise understanding of this concept in a particular State. Ultimately, the nature of the title and title exceptions that will be acceptable for public housing development is for administrative determination by Housing.

II. Catawba Claim

The Catawba claim is to lands included in a reservation established by the British crown in 1763. It is claimed that the Tribe's cession of the tract to the State of South Carolina in 1840 was in violation of the Indian Non-Intercourse Act of 1790. A letter (August 30, 1977) from the Interior Solicitor to the Department of Justice states that:

> "We conclude . . . that the Catawba's claim to their 15 mile square reservation is a valid one under the Non-Intercourse Act and that they can readily establish a prima facie case. We also conclude that the United States has a continuing duty arising from the 1763 treaty and also from the Non-Intercourse Act to bring an action on behalf of the Catawba to restore possession of their reservation. We recommend that the appropriate form of action be a suit for ejectment of the current possessors of the tract and mesne profits for the period of time the Tribe has been dispossessed."

Recent testimony by the Interior Solicitor before the Committee on Interior and Insular Affairs of the U.S. House of Representatives indicates that attempts to negotiate a settlement of the Catawba claims have not been successful. (We have attached copies of the Solicitor's letter to DOJ, and of the Solicitor's testimony).

III. Risks Not Covered under Title Policy

Since the purpose of title insurance is to shift the risk of the assertion of title claims to the title company, we have attempted to determine the nature of the risks remaining to HUD and the PHA under a title insurance policy with the form of Indian exception used by Lawyers Title. The form of Indian exception in the Lawyers Title policy commences with a broad exclusion of damage claims arising out of "any treaty or out of the Indian Non-Intercourse Act of 1790 or any similar state or federal law." The title insurance company promises, however, to pay for damages resulting from such claims by reason of the insured "being actually evicted from possession of the land" due to enforcement of a judicial decree. The litigation costs for defense of the possessory action must be borne by the insured, and the insurer's promise to pay damages for an eviction is conditional upon the insured meeting these costs.

Three concerns will be noted:

a. While the undertaking to pay damages for "actual evictions" may appear to cover the most serious risk from the assertion of Indian claims against the policy-holder PHA, there is a possibility that the term "eviction" could be construed to apply only to a divestiture of possession in a landlord-tenant action, but not to other forms of possessory action. The normal form of action for recovery of possession is an action for ejectment. Recovery against the policy for damages resulting from an actual ejectment might be resisted or denied on the ground that an ejectment is not an eviction covered under the technical language of the policy.

b. The title policy would provide no protection against damages resulting from an action by or on behalf of the Catawbas seeking money damages for the value or profits for use of the land, or for rent of the land.

c. The PHA would be required to pay litigation costs for defense of a possessory action. This represents a serious element of exposure under the title policy. The defense of litigation involving the assertion of historically-based Indian claims could be complex, prolonged and expensive.

A letter to OGC from the attorney for the town of Fort Mill, one of the two towns involved, states that the Town would be willing to pay for the PHA's court costs and pay attorney fees in defense of an Indian claims action. If you elect to rely on a promise of the local government to pay for the litigation costs, the agreement should be reduced to writing before the PHA is authorized to proceed with development.

If litigation fees are not covered by the local government or some other non-project source, they could only be paid from public housing project operating funds. It is unlikely that substantial fees or costs could be met other than by provision of additional operating subsidy by HUD. If the Department of Justice undertakes judicial action to enforce the Catawba claims under the 1790 Act (as it was required to do on behalf of the Maine Indians), it is doubtful that operating subsidy could be paid for the purpose of supporting a PHA litigation position contrary to the position asserted by Justice (see Litigation Handbook, 1530.1 Rev.-3, Section 12.b(2)(a)).

The promise by the title company to cover damages from an "eviction," as coupled with the requirement for payment of litigation costs by the insured, suggests that the title company regards the exposure to litigation costs as a more serious risk than the likelihood that the Catawbas would ultimately recover possession of the land.

IV. Negotiation of Better Title Coverage

Having analyzed the main elements of exposure under the title policy provision as presented to us, we do not know whether there is a possibility of obtaining a better title coverage:

a. We do not know if other title insurance companies also operate in the affected areas of South Carolina. If other companies are prepared to provide the title coverage, it should be determined whether any of the other companies is willing to provide the required coverage without any Indian claims exception, or with improved coverage.

b. We do not know if there is any possibility of negotiating modifications of the Indian claims exception used by Lawyers Title. A communication from the attorney for the Fort Mill Housing Authority to this office states that a mortgagee policy on a FmHA project in the Indian claim area, as written by Lawyers Title, included an Indian claims exception, but did not require payment of litigation costs by the insured. An attempt should be made to negotiate an improvement of the current exception language: (1) optimally, by deleting altogether the Indian claims exception; (2) by extending coverage to injury in the form of money damages for occupancy of the land; (3) by making explicit that the promise to pay damages for a loss of possession would apply regardless of the form of possessory action; (4) by eliminating the requirement for payment of litigation costs by the insured.

Lawyers Title may, of course, refuse to make any change in the title exception, or may agree only to limited improvements in the language. We are unable to assess the likelihood of actual damages by assertion of the Indian claims if the title company declines to make any or all of the improvements in coverage, and if HUD then decides nevertheless to proceed with the project. We would be reluctant, however, to recommend that you authorize the acquisition of title in the absence of changes in the policy form substantially reflecting items (2), (3) and (4).

V. Conclusion

The decision on the title exception on the two projects involved in the present request cannot practically be limited to the cases immediately involved. Whatever position is established here will almost certainly control the position on title exceptions for Indian claims in future cases, and in other areas of the country. So far as we know, Central Office has not approved the inclusion of Indian claims exceptions to title coverage for public housing projects in other states where claims have been asserted under the Non-Intercourse Act.

In view of the opinion by the Interior Solicitor that the Catawba claim is valid, we do not believe that the possibility of a title challenge can be regarded as remote or insubstantial. As a policy matter, you may make the judgment that the Catawba claim and other like Indian claims are more likely to be resolved by settlements funded by Congressional appropriations than by eviction of non-Indian occupants from properties subject to Indian claims. Such a policy judgment could serve as the basis for a decision by Housing to allow the inclusion of an Indian exception in a title insurance policy issued to a PHA.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

Attachments

AUG 23 1979

3GG

Mr. Paul F. Friend
Executive Director
Housing Authority of the
 County of Huntingdon
100 Federal Drive
Mt. Union, PA 17066

Dear Mr. Friend:

Subject: Peggy McCartney v. Paul F. Friend
Pa. Superior Court

This is in reference to the above-captioned litigation which challenges your Authority's denial of admission to Plaintiff Peggy Sue McCartney on the ground that she was a minor at the time of her application.

The HUD regulations on tenant selection, 24 C.F.R. §860.204, require public housing authorities (PHAs) to adopt and implement policies and procedures embodying standards and criteria for tenant selection. §860.204(c)(1) provides that such policies and procedures shall not automatically deny admission to a particular group or category of otherwise eligible applicants. HUD Handbook 7465.1 REV, The Public Housing Occupancy Handbook (Oct. 1978), copy enclosed, states in paragraph 2-7 that "this requirement precludes the exclusion of applicants on the basis of age..." Paragraph 2-7(a) continues "PHAs may adopt policies that take into consideration the ability of the applicant to live independently and meet his or her obligations under the lease (See 24 C.F.R. 866.4(f))." This policy does not preempt or challenge state law whereby persons under 18 years of age cannot execute any contracts. However, where they may contract for or be held responsible for the reasonable value of necessaries (such as in Pennsylvania), authorities cannot automatically refuse to accept applications from persons merely because they are under 18 years of age. Additionally, 24 C.F.R. §860.207(a) states that PHAs shall promptly notify applicants determined to be ineligible for admission of the basis of such determination and shall provide the applicant an opportunity for an informal hearing on such determination.

Accordingly, we suggest that your Authority revise its policy of automatically denying applications from minors seeking admission to its housing projects. We also urge you to attempt to settle the McCartney litigation. Please keep us apprised of its further developments.

Feel free to contact this office if you have any questions.

Sincerely,

/s/ Peter M. Campanella

Peter M. Campanella
Acting Regional Counsel

Enclosure

SEP - 4 1979

MEMORANDUM TO: John C. Yazurlo, Assistant Inspector General
for Audit, Office of
Inspector General, ZA

SUBJECT: Request for Interpretation and Clarification of
Section 891.403(b) of Title 24, C.F.R.

In your memorandum of June 20, 1979, you asked about the permitted uses of the contract authority held in the Reserve by the Secretary pursuant to 24 C.F.R. Section 891.403(b). This question arose in the context of your review of twelve Section 8 projects processed in the Boston and Hartford Area Offices that were funded from the Secretary's Reserve. Housing has informed you that the reason for using the Reserve to fund these projects was to meet the Departmental objective of achieving construction starts. Your memorandum of June 20, 1979, states that in your opinion, the regulations applicable at the time the projects were funded do not permit the use of the Secretary's Reserve to achieve construction starts.

As of the last quarter of Fiscal Year 1978, Section 891.403(b) provided that the contract authority reserved by the Secretary pursuant to Section 213(d) of the Housing and Community Development Act of 1974, not to exceed 20 percent of available contract authority, might be used for:

(1) Housing needs which were unforeseeable, or for other reasons that could not practicably be measured by the formula described in Section 891.402, such as natural disaster housing requirements or unanticipated relocation needs.

(2) Activities designed to meet lower-income housing needs as described in HAPs submitted by local governments or combinations of such local governmental units, including but not limited to, activities carried out under areawide plans pursuant to Subpart E.

(3) Applications for assistance with respect to housing in New Communities.

The purposes for which the Reserve may be used, already very broad in scope, were expanded further by the amendment, on October 30, 1978, of Section 891.403(b) to include the following additional uses:

(4) Alternative methods for meeting lower-income housing needs or implementing innovative housing programs.

(5) Housing needs of community development block grant recipients whose application approval has been conditioned or otherwise sanctioned on improved HAP performance.

Thus, the Reserve may be used for any activity that falls into one of the five categories listed, regardless of whether such activity also fulfills a Departmental objective not listed in Section 891.403(b). Housing informs us that each of the twelve projects you have questioned are located in jurisdictions that had an approved Housing Assistance Plan in FY 1978 when these projects were approved. If, according to your records or those of Housing, the projects meet lower-income housing needs as described in these HAPs, use of the Reserve to fund these projects was clearly authorized under Section 891.403(b)(2).

/s/ **Edward W. Norton**
Edward W. Norton
Acting General Counsel

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SAN FRANCISCO REGIONAL OFFICE
450 GOLDEN GATE AVENUE, P.O. BOX 36003
SAN FRANCISCO, CALIFORNIA 94102

December 4, 1979

REGION IX
Office of Regional Counsel

IN REPLY REFER TO:
9G

Mr. Alfred R. Sorenson
Attorney at Law
11 West Jefferson Street
Suite 607, Luhrs Building
Phoenix, Arizona 85003

Dear Mr. Sorenson:

We have your letter requesting information on the liability of Commissioners of Arizona Housing Authorities and, specifically, on the nature of HUD's commitment to hold such commissioners harmless from individual liability in matters arising out of Housing Authority business.

As you no doubt know, this Department does not enter into Annual Contributions Contracts with Arizona Housing Authorities because of the severe restrictions placed on such Authorities by the last clause of ARS § 36-1404A. The inability to borrow money or acquire any interest in real property precludes direct contractual participation by Arizona Housing Authorities in the housing programs of this Department. Thus, your reference to Section 516 of Part Two of the standard form of Annual Contributions Contract is only appropriate with respect to the members of the Board of Supervisors of Maricopa County. Moreover, the limitation on liability contained in Section 516 only deals with "...any obligation assumed...hereunder...." Although 'obligation' is not an expressly defined term, we believe that the exculpation only extends to the financial obligations (i.e., Project Loan Notes, Permanent Notes and Bonds) assumed by the Board of Supervisors of Maricopa County with respect to housing projects assisted pursuant to the subject Annual Contributions Contract.

Unfortunately, there are no statutory provisions, and, therefore, no HUD policy or regulations authorizing the use of any funds for the defense of such litigation or to provide for any sort of hold-harmless coverage. Accordingly, the policy of the Department with regard to settlements and judgments respecting individual liability is that there is no provision for idemnification.

In this connection, it can be noted that there is also no authority for the Federal Government to pay or indemnify even a federal employee for a judgment rendered against him and even if the employee acted within the scope of his employment (28 CFR Part 50).

With regard to providing legal counsel for officers of a Housing Authority in their individual capacities, idemnification for legal expenses in litigation brought against a Housing Authority is handled in accordance with HUD Litigation Handbook (1530.1 Rev. 3, Para. 12(b)(2) which provides that:

> "if the costs of litigation and litigation services are funded in whole or in part with a loan, grant or subsidy from HUD, concurrence is required before litigation is instituted, a contract for litigation services is executed, an appeal is taken or settlement made."

Program or project funds, if available, are used in defending litigation pursuant to the handbook provision. HUD is not authorized to provide any other type of funds for such use. On the other hand, HUD's policy or position concerning use of public housing project funds for reimbursement of legal fees and expenses incurred as a result of litigation involving personal liability of members of PHA Board of Commissioners or of the Executive Director is determined after resolution of the case. If a determination is made that the individuals were acting in their official capacity and were performing functions within the normal scope of their responsibilities, then, project funds could be authorized to defray such costs. We are enclosing a copy of our Litigation Handbook (cited above) for your reference and information.

A cursory review of pertinent Arizona law discloses that the subject of the personal liability of individual public officials has been addressed. See, for example, ARS §-11-266 dealing with the personal liability of the individual members of the Board of Supervisors of Maricopa County and, with respect to Public Housing Agency staff and Housing Authority Commissioners, ARS § 11-261.

We trust that the above discussion is responsive to your inquiry.

Sincerely,

Paul De Mare
PAUL DEMARE
Associate Regional Counsel

WILLIAM M. NORTH, JR.
Regional Counsel

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

DEC 14 1979

IN REPLY REFER TO:

Mr. Joseph Burstein
Fried, Frank, Harris, Shriver & Kampelman
Suite 1000
600 New Hampshire Avenue, N.W.
Washington, D. C. 20037

Dear Mr. Burstein:

This is in response to your letter of October 9, 1979, requesting a legal opinion as to whether the provisions of 24 CFR § 811.109(c) concerning servicing fees applies to interim financing of FHA-insured housing.

The provision in question states that:

> "An amount not to exceed one-fourth of 1% of the obligations may be allowed for the servicing fee. All individual items of the servicing fee shall be shown to be necessary for the servicing of the obligations and shown to be reasonable in relation to the costs of servicing similar obligations."

This provision is followed in the regulations by § 811.110, captioned "Interim Financing." This section provides rules concerning terms and conditions of interim financing and is silent with respect to a servicing fee.

Although the term "obligations" is defined under § 811.102(n) to cover interim and permanent financing, the arrangement of §§ 811.109 and 811.110 indicates that the servicing fee is designed to apply to permanent obligations and not to interim financing. For this reason, Handbook instructions presently in clearance within the Department do not provide for servicing fees in connection with interim financing.

This result is compatible with existing FHA practice and policy in connection with nontax-exempt financing and is, we believe, consonant with statutory provisions governing tax-exempt status of obligations under Part 811.

I have furnished your letter to Housing for its consideration in the continuing formulation of policy.

Sincerely,

Robert S. Kenison

Robert S. Kenison
Associate General Counsel
for Urban Development

16 JUL 1979

MEMORANDUM TO: Marilyn Melkonian
Acting Deputy Assistant Secretary
for Multifamily Housing Programs

SUBJECT: New Construction under the Section 8 Neighborhood Strategy Area (NSA) Program

You have requested our advice on whether Assistant Secretary Simons may waive Section 880.203 of the Section 8 New Construction Regulations, requiring a Notification of Fund Availability (NOFA), for units included under a set-aside of units for an NSA. You are requesting this waiver to permit approximately 22 local governments participating in the NSA program, whose set-asides include a total of 2,100 Section 8 new construction units, to solicit and select proposals as they do proposals for substantial rehabilitation units under Section 881.305(a) of the NSA Regulations. HUD would continue to make the final decision regarding acceptability of proposals. Subsequent processing would be in accordance with the regular New Construction Regulations and Handbook, except that, in addition, local governments and owners would be required to comply with the special NSA relocation provisions in Section 881.309 and local governments would be required to submit the information required by Section 881.305(g).

Waivers may only be granted on a case-by-case basis. In our March 23, 1978, comments on the proposed Departmental Organizational Policies Standards and Procedures Handbook, we noted that:

> The proper definition of the term "waiver" is that it is a decision not to enforce a violation of a program requirement in a particular case for good cause. A waiver is not a decision to relieve a class of individuals generally from one or more requirements of a regulation . . . . Such a determination constitutes rule making and is not legally effective unless carried out in accordance with 24 CFR Part 10.

Under this guideline Assistant Secretary Simons may grant a waiver for each affected locality if he makes a determination in each case that there is good cause to do so.

In our discussions with your staff, it appears that individual waivers would be appropriate for many and perhaps all of the localities affected. As you point out, the NSA regulations, HUD memoranda to the field, and HUD letters to local governments are unclear on the process to be followed when new construction is approved in the set-aside. The preamble to the NSA Regulations indicates that up to 20 percent of the set-aside may be for new construction units. Section 881.304(f)(2) does not require that the notification approving the set-aside identify the units by housing type (new/rehab), although this was of course done where applicable. Section 881.305(h) of the NSA Regulations states: "Proposals for housing assistance programs other than Section 8 Substantial Rehabilitation under this subpart which are identified by the local government as part of its strategy shall be submitted and processed in accordance with applicable program regulations and issuances." Where the set-aside included new construction units, there has been confusion over whether, for purposes of processing, those units are to be treated as substantial rehabilitation or new construction units. Therefore, it is not clear whether the "applicable program regulations and issuances" for the new construction set-aside units should be the NSA Regulations or the New Construction Regulations.

Your reports from the field indicate that the local governments which were awarded new construction units in the Secretary's approval letter of last fall assumed that they could solicit proposals for these units in the same way as NSA Section 8 substantial rehabilitation proposals. We understand that many local governments have already taken steps to inform developers about the program, including advertising or otherwise soliciting Section 8 proposals. Developers have responded and incurred expenses in anticipation of participating in the NSA program.

Housing should consider the factual situation in each locality where you think a waiver would be appropriate to determine whether hardship or other justification for a waiver appears to be present. Field Office reports on the status of the NSA program in the localities would provide one form of adequate documentation. Where he finds good cause, Assistant Secretary Simons may waive the Section 8 New Construction Regulations subject to the conditions described in the first paragraph of this memorandum. We understand that you intend to take prompt action to amend the NSA Regulations.

(signed) Irving P. Margulies

Edward W. Norton
Acting General Counsel

Perrin M. Law, Director, Housing
Attn: Multi-Family Reps

July 26, 1979

4.5G

Area Counsel

Definition of Public Housing Agency
(PHA)-"Owned" Projects

It has been inquired of the Office of Area Counsel (OAC) whether, for projects regarding which the Department of Housing and Urban Development (HUD) proposes to enter a Housing Assistance Payments Contracts (HAPC) under Sec. 8 of the United States Housing Act of 1937 (USHA) as reenacted by Sec. 201(a) of the Housing and Community Development Act of 1974, 88 Stat. 633, at 667 et seq., 42 USCA § 1437f, utilizing funds appropriated by the Congress to Tit. I of the HUD-Independent Agencies Appropriations Act of 1978 (HUD-IAAA'78) 91 Stat. 1073 for projects"to be owned by public housing agencies", such proposed projects may be owned by an agency or instrumentality (A/I)-PHA as that term is used in the HUD regulations, 24 CFR Pt. 880 [1978] and as it is defined at 24 CFR § 811.102?

OPINION

We are of the opinion that HUD cannot enter into a HAPC with A/I-PHA utilizing monies set aside for PHA-owned projects by the HUD-IAAA'78.

* * * * * * * * * * * * * * *

A project may be regarded as PHA-owned if owned by an A/I-PHA provided that there is a lease for the life of the HAPC to the PHA. That conclusion was reached by application of the statutory and regulatory definitions of "owner" found at Sec. 8(f)(4), USHA, 88 Stat. 665, 42 USCA § 1437f(f)(4) and at 24 CFR § 880.102 respectively. It is true that Sec. 3(6) USHA, 88 Stat. 655, 42 USCA § 1437a, defines a "PHA" as including an A/I of a PHA as does 24 CFR § 880.104.

Without repeating in detail the past OAC opinions on the subject, a Mississippi PHA, cannot create a non-profit private corporation as its A/I for the purpose of contracting with the United States. For the purpose of issuing securities which would be tax exempt under Sec. 11(b) USHA, 88 Stat. 665, 42 USCA § 1437i(b), the HUD regulations and the interpretations thereof have so treated the term "agency or instrumentality" as to render the term legally contentless, thereby removing OAC objections to the use of an A/I-PHA to issue Sec. 11(b)-type securities.

A decision has not been made by HUD either as a policy matter or in the Office of General Counsel (OGC) to take the same approach to either 24 CFR Pt. 880 or the HUD-IAAA'78.

We were instructed by OGC that any proposals to treat an A/I-PHA as a PHA for the purposes of entering into a HAPC with HUD employing funds set aside by the Congress for PHA-owned projects should be referred to the OGC in writing.

I am of the opinion that such a proposal is not looked upon with favor at OGC.

Area Counsel

August 23, 1979

5G

Donald O. Walsh
Overton, Schwartz & Yacker, Ltd.
105 W. Adams Street
Chicago, Illinois 60603

Gordon Waldron
Sara E. Johnson
Legal Assistance Foundation
of Chicago
343 S. Dearborn Street
Chicago, Illinois 60604

Subject: HUD Occupancy Standards Under the Section 8 Housing Assistance Payment Program for Substantial Rehabilitation Projects

Dear Mr. Walsh, Mr. Waldron, and Ms. Johnson:

This is in response to your letter to me dated August 10, 1979, which requested HUD's position with respect to the proper application of the Section 8 substantial rehabilitation occupancy regulations and policies to the fact situation presented in your letter. After careful consideration of the respective positions of the developer and the tenant applicant and after consultation with Chicago Area Office and Central Office program officials, it is our opinion that rejection of the for tenancy in a three bedroom unit in Palmer Square Apartments is permissible under HUD's occupancy standards.

Under the United States Housing Act of 1937, as amended, 42 U.S.C. §1437F(e)(2), "The contract between the Secretary and the owner with respect to newly constructed or substantially rehabilitated dwelling units shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner. . ." The regulations carry out this statutory directive by making the owner responsible for the management of the project, including "performance of all management functions including the . . . selection of families . . . and determination of eligibility . . ." 24 C.F.R. §883.215(a)(3). This owner responsibility is repeated in 24 C.F.R. §883.318(b)(1), which provides: "The Owner shall be responsible for determination of eligibility of applicants, selection of families from among those determined to be eligible, and computation of the amount of housing assistance payments on behalf of each selected family, in accordance with schedules and criteria established by HUD." In general, this means that an owner has the sole responsibility to determine if a unit is appropriate for a family of a given size and composition. The management of the project is expected to make administrative determinations taking into consideration extenuating circumstances some of which may include;

a. That a given building may already be filled with "too many" children.
b. The ages and sizes of the children and their life style,
c. The size and design of the bedrooms (or other rooms) in question.

The Application for participation in the Section 8 Program, HUD-52659, indicates in the instructions the appropriate number of bedrooms which "should" be assigned for families of various sizes. HUD program personnel heed the distinction between the words "should" and "must". Accordingly, the designations are suggestive rather than mandatory. The Instruction Form also uses the word "guidelines" to describe the occupancy criteria that are set forth in paragraph 11.

The "Occupancy Standards" in Section XII of the Chicago Area Office sample Policy do not negate the developer's position in this case. The standard gives a maximum of 7 for a 3-bedroom unit; however such a standard could only be used by applying the criteria in item No. 3: "Three small children of the same sex may share the same bedroom in the larger size units." There might also be situations in which it might be appropriate for a family member to sleep in a living room or other suitable area. The family in question does not meet the criteria of "three small children" since the boys' ages are 8, 9 15 and the girls' ages are 11, 18 and 19. The absence of the 19 year old daughter during the college year does not substantially alter the situation since the three boys could not share the same bedroom even under HUD guidelines.

It is our position that, within limits project management is free to make their determinations, as long as they have good reasons for their decisions and provided their policies are clearly established, consistently applied and violate no law or HUD regulation. The Management's Resident Selection Criteria that : "The unit applied for shall not require more than two persons to occupy the same bedroom", Page [illegible] III., does not appear to violate any of HUD's regulations and is consistent with HUD guidelines.

I hope this letter is responsive to your request for HUD's position in this matter.

Sincerely,

Richard J. Flando
Regional Counsel

SEP 1 9 1979

Mr. Bernard H. Donahue
President, NAHRO
Puget Sound Chapter
P.O. Box 68637
15455 - 65th Avenue, South
Seattle, Washington 98188

Dear Mr. Donahue:

In your June 11, 1979 letter, you question the legal basis for several of the statements in my letter to you of April 23, 1979. Our letter stated that under 24 CFR §882.212, concerning reexamination of Family Income.

> HUD has taken the position that, although a PHA may establish as part of its administrative plan a requirement that income reexaminations be made more frequently than annually (for all families, certain types of families, or specific families where it is not feasible to reasonably anticipate the income over the year, *see* 24 CFR §882.104(c)), a family may not be required to report interim changes in circumstances affecting its share of the rent.

We have discussed this issue again with the Office of Housing and concluded that it would be consistent with the regulations for a PHA to require that families report interim changes in circumstances which would affect the amount of Gross Family Contribution. Accordingly, where a PHA determines that it would be cost effective and administratively feasible to implement such an interim reporting requirement, the PHA may request the HUD field office to approve an amendment of its administrative plan to include such a requirement.

We regret the delay in responding to your letter while we have considered making this change in HUD policy. This policy change will be reflected in a PHA administrative practices handbook now being developed by HUD. Thank you for bringing this issue to our attention.

Sincerely,
/s/ Edward W. Norton
Edward W. Norton
Acting General Counsel

John W. Kopecky, Associate General Counsel
for Insured Housing

DEC 7 1979

Robert S. Kenison, Urban Development Division

Preserving the Stock of Low and Moderate-Income Housing

Your division has the lead in developing the OGC response to questions raised by Michael G. Smith of the National Housing Law Project. By memorandum dated November 8, 1979 to the General Counsel, Mr. Smith expressed his concern about the possibility of various HUD related housing being lost from the low and moderate-income housing inventory. We have the following observations with regard to the Section 8 program.

Section 8 Default Provisions

Under the Contracts for the Section 8 program as it was initially developed, the default provisions stated that HUD (or the PHA where one was involved) could abate housing assistance payments, terminate the HAP Contract, or take other corrective action. We are aware of no HAP Contract being terminated, by an Owner, by a PHA, or by HUD. The issue of whether HUD could or would sue for specific performance (i.e. sue to require the Owner to continue to provide assisted housing in the project) has never come up except in theoretical speculation. Although it is possible we would sue for damages or specific performance if the Owner defaulted under the HAP Contract, the outcome is uncertain. It seems unlikely that, without a specific Contract provision, a court would "award the property to HUD as a consequence of the Owner's continued refusal to accept the Section 8 payments" (see page 4 of Mr. Smith's memorandum).

The revised Section 8 New Construction Regulations (Part 880) were published on October 15, effective November 5, 1979. Conforming changes are in the pipeline for the Substantial Rehabilitation (Part 881) and State Agencies (Part 883) Programs. We plan to strengthen the default provisions in the revised HAP Contracts by expanding the specified list of possible remedies if an Owner defaults. The new tentative list, which would not be an exclusive list of remedies, would provide for HUD or the PHA to take possession of the project, to operate the project, to sue to have a receiver take over and operate the project, and to seek an injunction against any violation of the Contract. Abatement of payments and termination of the Contract would still be options. Projects financed with tax exempt obligations under Part 811 are already subject to comparable requirements.

Term of Section 8 HAP Contract

The HAP Contract as originally designed provided for an initial five year term, renewable at the sole option of the Owner for up to the maximum term of between 20 and 40 years. The revised regulations provide for a single term, partly in response to the GAO report to Senator Proxmire. The Owner will no longer have the option of declining to renew the HAP Contract. The revised Contract will be revised to make explicit that HUD requires the Owner to lease 90 percent of the units in the project to eligible families, unless prior written HUD approval is obtained. Failure to comply is specifically made a violation of the Contract and grounds for all legal remedies, including specific performance. See Section 880.504.

The revised regulations strengthen HUD's hand to require the Owner to operate the project to provide housing for Section 8 assisted families for the maximum term consistent with the regulations. However, in practical effect, the previous system also restricted the Owner since the lender typically required the Owner to agree to renew for the maximum term. Although in the flush of "good times" an Owner may be tempted to drop the Section 8 Contract, a lender may be more cautious and refuse to release the Owner from that condition, not wanting to forfeit the security of the subsidy flow under the Section 8 Program.

Other Section 8 Issues

There is no Federal requirement that a Section 8 Contract be recorded along with the deed. We understand there have been a few instances where the private Owner was required by the locality to include a deed restriction limiting use of the property for low-rent housing. We are not aware that such covenants run in favor of the Government.

We are not familiar with remedies available against an "innocent third party" who buys a Section 8 project without notice of any Section 8 limitations. However, it is rather unlikely that anyone would buy a multifamily structure without knowing how the income for the project is generated. The Section 8 HAP Contract requires that the Owner obtain written HUD approval before it may sell the project, assign the Contract, or otherwise transfer its interests in either.

Property Disposition with Section 8

We understand that your office is developing a variety of deed restrictions and other tools to assure that HUD-owned projects sold with Section 8 assistance will continue to provide assistance for Section 8 families. We defer to you to describe HUD's actions in this area.

Robert S. Kenison
Associate General Counsel

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF GENERAL COUNSEL

25 OCT 1979

IN REPLY REFER TO:

MEMORANDUM FOR: Lawrence B. Simons, Assistant Secretary
for Housing-Federal
Housing Commissioner, H

SUBJECT: Congregate Housing Services Act of 1978 -- Use of Congregate Services Authorization for Costs of HUD Program Evaluation

The Congregate Housing Services Act of 1978 (Title IV of the Housing and Community Development Amendments of 1978) requires HUD to:

> ". . . publish annually and submit to the Congress, a report on and evaluation of the impact and effectiveness of congregate services programs assisted under this title." [section 408(b)(2); see also, section 408(b)(1)]

Your memorandum of October 15, 1979, asks if congregate housing program funds may be used to pay for costs of the required program evaluation by HUD. You state that your reading of the Act suggests that program funds may not be used for this purpose. We agree with this conclusion.

HUD may use the sums appropriated under the Act for contract payments to public housing agencies or nonprofits, for the purpose of providing services to residents of congregate housing (section 404). Section 408(b) of the Act, which requires the annual HUD evaluation, also provides that each PHA or nonprofit receiving assistance under the Act must submit an annual report to HUD, evaluating the recipient's congregate services program [section 408(b)(1); cf. also, section 407(c)]. HUD's annual evaluation and report to the Congress are to be partly based on the evaluations submitted to HUD by the recipients [section 408(b)(2)].

The Act establishes a specific limitation on the use of congregate services funds for the annual evaluations by the recipients. No more than one percent of the funds appropriated in each year for the provision of services under the Act may be used for the required recipient evaluations [section 409(a)(5)]. There is no reference in the Act to use by HUD, for the annual HUD evaluation and report to Congress, of funds authorized or appropriated under the Act. Hence there is also no stated restriction on the amounts that might be used for this purpose.

We do not read the silence of Congress on the source of funding to be used for the HUD evaluation and report to imply an authority to utilize the funds provided under this Act for this purpose. Rather, we believe that the legislation only allows use of the appropriated funds for contract payments to recipients. The specified one percent limitation on PHA evaluation costs was appropriate in this context, as a limitation on the use of funds by recipients. It was not necessary to specify a maximum limit on the use of program funds by HUD for the required evaluations, since there is no basic authorization to use program funds for HUD expenses in administration of the program, whether for evaluation costs or for other administrative purposes. Because program funds may not be used for the annual evaluation and report, it will be necessary to find some alternative source of funding.

Julie Herr for

S. Leigh Curry, Jr.
Acting Deputy General Counsel

17 AUG 1979

MEMORANDUM TO: Lawrence B. Simons, Assistant Secretary for
Housing - Federal Housing
Commissioner, H

SUBJECT: Nonapplicability of OMB Circular A-102 to Assisted Housing Programs

In a memorandum of June 19, 1979, you requested our legal opinion on the applicability of OMB Circular A-102 to assistance under the United States Housing Act of 1937. The Circular prescribes uniform standards for administration by Federal agencies of programs involving grants to State or local government. The term "grant," as defined by the Circular, includes financial assistance paid or furnished by the Federal government to a State or local government (Circular, section 7(a)). Assistance in the form of loans, loan guarantees, or revenue sharing is not covered by the Circular (section 6, section 7(a)).

Housing assistance under the United States Housing Act of 1937 is provided through the Public Housing Program and the Section 8 Housing Assistance Payments Program. For the reasons set forth below, we have concluded that the nature and history of these programs are such that their coverage is not contemplated by the Circular.

I. Public Housing

Public housing projects are developed, owned and operated by local housing authorities. The local housing authorities are formed under individual State enabling statutes. These statutes typically provide for activation of a housing authority in each locality through appointment of Commissioners by the local government. Most of the enabling statutes were enacted in the individual States for the specific purpose of permitting the participation by the localities in the public housing program under the United States Housing Act of 1937. The statutes generally followed model forms provided by the predecessors of HUD for this purpose, which are intended to incorporate the statutory powers necessary to permit participation in the public housing program.

HUD provides assistance to a local housing authority in financing the capital cost for initial development of a low income project, and may later provide additional assistance in financing needed modernization of the project in the manner described below. Most of the local housing authorities participating in the public housing program do not receive funding from non-HUD sources; where they do, the amounts of non-HUD Federal funding are minor in relation to the scale of activities funded under the HUD programs. For the most part, the local housing authorities do not have any assets or income other than assets or income generated in connection with the HUD programs.

HUD's assistance in the financing of housing by a local housing authority takes two forms:

1. A HUD agreement to lend to the housing authority the amount needed to develop or modernize a project.

2. A HUD guarantee of annual debt service payments (called "annual contributions") that will be sufficient to retire the capital debt incurred by the housing authority for the development or modernization.

HUD's agreement to lend, and to guarantee debt service payments to amortize the loan, are incorporated in a contract between HUD and the local housing authority, called the "Annual Contributions Contract" or ACC. The ACC establishes a continuing relationship between HUD and the housing authority over the life of the HUD debt guarantee commitment (generally forty years), and obligates the housing authority to develop and operate the low income housing in accordance with HUD requirements over this period. HUD, in turn, agrees in the ACC to lend an amount equal to the maximum authorized development cost. The loan commitment by HUD is authorized under Section 4(a) of the USH Act of 1937, allowing the Secretary to make " . . . loans or commitments to make loans to public housing agencies to help finance or refinance the development, acquisition or operation of low-income housing projects . . . ."

Assistance by loan or loan guarantee is specifically excluded from coverage under Circular A-102. The HUD loan commitment and debt service guarantee, which are used to provide the financing for public housing capital costs, fall within this exclusion from A-102.

The financing of development cost for a public housing project may pass through three phases:

1. Direct borrowing from HUD against the loan commitment in the ACC.

2. Sale of short term notes (Project Notes) on the private market. These notes are secured and made marketable by a pledge of the HUD loan commitment under the ACC, in an amount that will cover principal and interest on the notes.

3. Sale of long-term Bonds on the private market. These bonds are secured and made marketable by a pledge of the HUD guarantee of debt service payments.

All of the money used to pay the costs incurred for modernization or development is raised by a local housing authority using the loan or debt service guarantees provided by HUD: borrowing from HUD, borrowing from note-holders secured by the HUD loan commitment, or borrowing from Bond-holders secured by the guarantee of debt service annual contributions. It is thus apparent that HUD assistance for financing development or modernization of a public housing project is provided by a combination of loan commitment and loan guarantee.

The loan character of the financing mechanism for public housing development or modernization cost is explicitly recognized in the established OMB procedures for HUD budgeting and use of the funds. The total amount of public housing development or modernization cost to be funded in a given fiscal year is released (apportioned) to HUD by OMB in the form of authority for "Loan Approvals" and is technically referred to as "loan authority." For example, the attached OMB Apportionment schedule for FY 79 apportions to HUD specified amounts for "Loan Approvals" for Production (development) and Management (modernization) (Line 8, Category B(1) (2) and (3)), representing the authorized amounts of public housing development and modernization cost.

By its own terms, which exclude loans and loan guarantees from its coverage, Circular A-102 excludes the financing assistance provided by HUD to local housing authorities.*/ The character of this assistance is not altered by the provision under the ACC of an additional subsidy for operation of the projects so financed. This additional operating subsidy was initially authorized under 1969 amendments of the 1937 Act. These amendments limited rent collections in the projects to one-fourth of family income and, as a result, created a need to supplement the operating funds of the projects. The money which supplements the debt service payment is referred to in the statute (section 9(a)) as an "annual contribution" to the operation of low income projects.

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*/Nor is there any policy reason to extend the Circular to cover this form of assistance. One of the objectives of the Circular is to minimize the time between "disbursement by a grantee and the transfer of funds from the United States Treasury to a grantee . . . ." (Circular A-102, Attachment J, Paragraph 1). This concern is not pertinent in the context described. Out of the total amount of local housing authority obligations outstanding at any time for public housing development and modernization cost, less than one percent is advanced by direct HUD loan. The funds for these direct HUD loans are currently provided from a HUD revolving fund, and are not borrowed from Treasury. The great bulk of public housing capital borrowing is raised by the local housing authorities through the unique financing mechanisms previously described, by borrowing from private lenders supported by the HUD loan commitment or annual contributions guarantee.

For most projects, the supplemental payments are currently made on an entitlement basis to the local housing authorities, in accordance with a regulatory formula. Only projects which are receiving, or which have received in the past, the debt service payments described above are eligible to receive the additional annual contributions. Thus, the annual contributions can be properly characterized as incidental to the underlying assistance relationship, which is in the nature of a loan and loan guarantee commitment by HUD.

Policy considerations do not suggest any other result. Because HUD's relationship with local housing authorities was always intended to be and is virtually exclusive, there is no problem of duplicative or conflicting requirements applied by different Federal agencies in connection with the assistance programs. In short, the actual operation of the public housing program does not present the kind of problem that Circular A-102 was designed to cure. In view of both the purpose and plain words of the Circular, we conclude accordingly that public housing assistance is excluded from coverage.

II. Section 8 Housing Assistance Payments

Section 8 was added to the United States Housing Act of 1937 by the Housing and Community Development Act of 1974. This section authorizes only a single form of assistance: housing assistance payments (HAP payments) to owners of dwelling units leased by lower income families. The HAP payments cover the difference between the full rent the owner is entitled to receive for the unit, and the amount paid by the family. HAP payments may be made for units in housing newly constructed for occupancy by assisted families, or for units in housing already in existence, including units requiring moderate or substantial rehabilitation.

HAP payments to owners are paid either under direct contract between HUD and the owner, or through a Public Housing Agency (PHA) as a conduit. When payment is to be made through a PHA, HUD enters into an annual contributions contract with the PHA, which then contracts to pass through the assistance payments to the owner. Otherwise, the PHA's only responsibility is to perform various administrative functions which would otherwise have to be performed by HUD staff, e.g., inspection of units. Whether HUD contracts directly with an owner, or with the PHA, the nature and form of the assistance are the same: HAP payments to owners.

The vast majority of Section 8 owners are private entities. Under the Act, however, a PHA with the legal power to own and operate rental housing is eligible to apply for a HAP commitment on the same terms as any private owner. The character of the assistance to a public Section 8 owner is the same as the assistance to a private owner; it is paid without regard to the public attributes of the owning entity. In other words, the assistance is given to the PHA as a Section 8 owner, not as a public entity. For this reason, the possibility of Section 8 ownership by a PHA does not alter the fundamental fact that this form of assistance is authorized only for owners -- not for government agencies as such. We conclude, consequently, that Section 8 assistance is not covered by Circular A-102.

/s/ Edward W. Norton

Edward W. Norton
Acting General Counsel

D-95 (7-75) PREVIOUS EDITION MAY BE USED

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

TO : Robert Kenison, Associate General Counsel for Urban Development, GU

DATE: October 22, 1979

IN REPLY REFER TO:
3G
ORC Memo # 415

FROM : Peter M. Campanella, Region III, Philadelphia, 3G

SUBJECT: Public Housing Modernization Program
Minority Contractors Participation

In response to your inquiry as to whether an affirmative action program similar to the program instituted by the San Antonio Housing Authority could be implemented by state housing authorities within region III it is our determination that this program could, pursuant to federal regulations, be implemented in the following states: Pennsylvania, West Virginia, Virginia, Maryland and the District of Columbia. The implementation of this type of program in Delaware could be barred by state procurement procedures.

A state by state analysis follows:

Pennsylvania

The Pennsylvania Housing Authorities Law is contained in 35 P.S. §1541 et. seq. The limitations on the powers of a Housing Authority to contract are set forth at 35 P.S. §1551. This section of the statute provides that whenever there is an estimated cost of any construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to authority control in excess of $2,500.00 that it will be the duty of the Authority to have the work performed by the lowest responsible bidder after advertisement for bids. (35 P.S. §1551(a). However this same section also provides:

> Notwithstanding anything to the contrary contained in this act or in any other provision of law, a housing authority may include, in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractor comply with the requirements as to the minimum wage and maximum hours of labor, and comply with any conditions which the Federal or State government may have attached to its financial aid of the project. (35 P.S. §1551(d).)

Therefore, in light of the "notwithstanding" provision it is our opinion that an affirmative action program similar to that of San Antonio could be implemented in Pennsylvania if it is proscribed by federal regulation and is a prerequisite to federal financial aid.

West Virginia

The enabling legislation for the creation of a housing authority of a city or county in West Virginia is found at 5 W.Va. Code §16-15-3. Pursuant to 5 W.Va. Code §16-15-7 the authority is authorized to provide housing accommodations for persons of low income, to prepare, carry out and operate projects and to provide for the construction, reconstruction, improvement, alteration or repair of any project or part thereof. In addition to these powers 5 W.Va. Code §16-15-7a provides:

> "A housing authority, in addition to its other powers, shall have power (notwithstanding anything to the contrary contained in this article or in any other provision of law) to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project (1941, c.49.) (emphasis author's)

A plain meaning analysis of the West Virginia statute would indicate that the notwithstanding provision would allow the city or county housing authority to implement the San Antonio program, if such a program were made a condition of federal aid and/or grants to the authority.

In addition there appears to be no general procurement and/or competitive bidding statute applying to all state agencies in the code. Nor are there any procurement statutes or regulations that apply to contracts with the West Virginia Housing Authority.

Virginia

The enabling legislation authorizing the creation of housing and redevelopment authorities in Virginia is found at 6 Va. Code ch. 1 § 36-4
6 Va. Code ch. 1 § 36-19(c) provides:

> (c) To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works, or facilities for, or in connection with a housing project or the occupants thereof, and (notwithstanding anything to the contrary contained in this chapter or in any other

> provision of law) to include in any contract let in connection with a project, any provisions required to comply with any conditions which the federal government may have attached to its financial aid of the project. 6 Va. Code ch. 1, § 36-19(c)

The "notwithstanding" provision would appear to allow HUD to include an affirmative action program as a condition for contracts for services or works in connection with a housing authority's functions. Accordingly this provision would appear to permit the application of procurement provisions in these contracts.

While Virginia does have a statute(3 Va. Code ch. 4, § 11-17) that applies a lowest bidder requirement to contracts over $2500.00;this statute is not specifically directed to housing authorities (though it does specify water, sewer and sanitation authorities). In light of 3 Va. Code ch. 4, § 11-17, failure to specifically refer to housing authorities and the "notwithstanding" provision of 6 Va. Code ch. 1, § 36-19(c) it is our opinion that an affirmative action program patterned on the San Antonio program could not be barred by the Virginia Statutes.

Maryland

The enabling legislation authorizing the creation of housing authorities in Maryland is within each city is found at 4B Md. Code Art. 44A § 4. Article 44A §8(c) of the Maryland Code Annotated provides that housing authorities have the power:

> To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works, or facilities for, or in connection with, a housing project or the occupants thereof; and (notwithstanding anything to the contrary contained in this article or in any other provision of law) to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project.

A plain analysis of the notwithstanding provision would indicate that any state laws, by clear statutory intent are subsidiary to whatever federal conditions are imposed for financial aid to the project.

There are no provisions for competive bidding that pertain to housing authorities in the Maryland statutes.

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

DATE: AUG 14 1979

TO : Burt J. Deutsch, GHM

IN REPLY REFER TO:
1G

FROM : Marvin H. Lerman, 1G

SUBJECT: Urban Redevelopment Corporation Excise Tax
(Chapter 121A, Section 10 of the Annotated Laws of Massachusetts)

This will supplement our memorandum to you on this subject dated May 14, 1979 concerning a request from the Boston Area Office Counsel for guidance as to HUD policy on payment of the Chapter 121A excise tax prior to and subsequent to foreclosure of projects with mortgages insured under the National Housing Act.

In our memorandum forwarding that request to you, we concluded that HUD mortgage liens appeared to have priority over the excise tax liens on the projects in question with respect to taxes assessed before foreclosure. A foreclosure serves to divest junior lien holders. See Mass.Gen.Laws Ann. ch. 244, sec. 14 and Milton Savings Bank v. United States, 345 Mass. 302, 187 N.E.2d 379 (1962). Therefore, HUD's foreclosure of its superior mortgage lien would serve to render indeffective the liens for excise taxes assessed prior to foreclosure, and HUD would not be liable for payment of those taxes after acquisition of title.

The question of HUD's liability for payment of excise taxes assessed after foreclosure does not involve a determination of lien priority, but rather a determination of HUD's amenability to taxation. Property of the United States and its agencies or instrumentalities is immune from taxation by the states or their subdivisions, unless Congress waives that immunity. Section 208 of the National Housing Act waives HUD's immunity from real property taxation with respect to projects acquired and held by HUD under Title II of that Act. To determine HUD's liability for payment of taxes assessed under Section 10 of Chapter 121A after foreclosure, it is necessary to decide whether that waiver of immunity from taxation extends to taxes assessed under

Pre Emption

It should be noted that if the Department should, pursuant to its rulemaking powers elect to prescribe regulations requiring that a percentage of all contracts issued by authorities be set aside for "disadvantaged contractors" as per the San Antonio Housing Authority program, these rules and regulations would have the full force of federal law Public Utilities Commission of California v. United States 335 U.S. 534 78 S.Ct. 446 2 L.Ed.2d 470 and would therefore pursuant to the Supremacy Clause of the Constitution prevail over any conflicting state law. Free v. Bland 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2 180 (1962), Perez v. Campbell 402 U.S. 637, 29 L.Ed.2d 233. Therefore insofar as the Delaware statute prescribing that all contracts from authorities in an amount of $2500.00 or more would be in conflict with the Department's regulations it would be preempted by the federal regulation. This would be similar to the provision found at 24 C.F.R. §403.5 where the Department preempted state rent control regulations which effected unsubsidized insured projects.

Peter M Campanella
Regional Counsel

Memorandum

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

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TO : Burt J. Deutsch, GHM

IN REPLY REFER TO:
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On June 13, 1979 we were contacted by Mr. Charles Bartlett of your staff on this matter, and on June 15, 1979 we discussed this matter further with Mr. Carlyle Blevins of the same office. As a result of those discussions, we understand that your office is in agreement with our analysis of the priority of the HUD mortgage liens and the state tax liens. However, further input from the Regional Office was desired before a decision was made with respect to payment of taxes assessed after foreclosure of an insured mortgage. Specifically, we were informed that the Boston Area Office may proceed with the appeal of taxes assessed on the Warren Gardens project, but that no decision on HUD's liability in general for payment of Chapter 121A taxes assessed after foreclosure will be made until a recommendation and request for concurrence is submitted from this office and that such a recommendation should be based on both programmatic and legal considerations.

As stated earlier, the legal issue is whether the waiver of immunity from real property taxation set forth in Section 208 of the National Housing Act encompasses a waiver of immunity for the taxes assessed under Section 10 of Chapter 121A. Congressional waivers of tax immunity must be strictly construed. See United States v. City of Adair, 539 F.2d 1185 (8th Cir. 1976), cert. denied 429 U.S. 1121 (1977). Applying that standard to this case, we believe that Section 208 of the National Housing Act can be construed as waiving HUD's immunity from taxation under Section 10 of Chapter 121A.

Section 10 of Chapter 121A by its terms exempts the real and personal property of an urban redevelopment corporation from taxation, and imposes in lieu thereof an "excise" equal to 5 percent of the corporation's gross income plus ten dollars per thousand of the fair cash value of the corporation's real and tangible personal property. The amount of the "excise" is further subject to the requirement that the excise payable in any year cannot be less than the amount which would be charged if the property were taxed at the municipal tax rate for that year, and that rate were applied to the lesser of (a) the fair cash value of the real and personal property determined in that year, or (b) the average of the assessed valuation of the real property for the three years prior to the acquisition of that property for redevelopment.

The assumption underlying this method of calculating the minimum excise seems to be that prior to acquisition of the property for redevelopment, the value of that property was less than its value after redevelopment.

In fact, Chapter 121A only authorizes urban redevelopment corporations to undertake projects which consist of "the construction in a blighted open, decadent or substandard area of decent, safe and sanitary residential, commercial, industrial, institutional, recreational or governmental buildings . . ." (see Section 1 of Chapter 121A). Since the real property used for a redevelopment project under that statute must be blighted open, substandard or decadent, it is reasonable to assume that the value of that property during the three years prior to its acquisition for the project will be less than the fair market value of the property after it has been redeveloped. Accordingly, the statute attempts to give the redevelopment corporation the benefit of the increased value of the property by restricting the taxable valuation of the property to the lesser of its current fair market value or its average value over three years preceding acquisition. Section 10 also provides that the "maximum fair cash value" of the project may be determined prior to construction of the project, and every fifth year thereafter, and that if this form of valuation is used, then that value will be applied in determining the amojnt payable under that section. The apparent purpose of this provision is to establish a means of limiting the redevelopment corporation's liability sufficiently early in the development process to permit an assessment of the project's economic feasibility.

As stated above, Section 10 of Chapter 121A exempts both real and personal property of an urban redevelopment corporation from taxation, and requires the corporation to pay to the state an "excise" in lieu of such taxes. The excise is then distributed to the city or town in which the corporation's project is located. Accordingly, it appears that the excise payable under Section 10 is a substitute for both real and personal property taxes which the corporation would otherwise be liable to pay to the city or town. However, property of the United States is immune from taxation without Congressional consent, and federal immunity from personal property taxation has not been waived with respect to these projects. This immunity is recognized in Mass.Gen. Laws Ann. ch. 59, sec. 5, which governs assessment of local taxes. That section exempts from taxation "property of the United States so far as the taxation of such property is constitutionally prohibited, excepting property which the Congress of the United States has permitted to be subject to local taxation." Since Section 208 of the National Housing Act permits only real property to be subject to taxation, any personal property is exempt from taxation by the terms of Section 5 of Chapter 59 of the state statutes. Therefore, Section 10 of Chapter 121A is not effective either to grant an exemption from personal property taxes for projects owned by HUD or to impose a charge in lieu of such taxes. However, HUD-owned projects would be subject to local real property taxation but for the exemption granted under Chapter 121A. Since HUD would be liable for payment of real property taxes but for the exemption from such taxes granted under Chapter 121A, we believe that the waiver of immunity from real property taxation provided in Section 208 of the National Housing Act should be interpreted to constitute a waiver of immunity from charges imposed in lieu of such taxes under the state statute.

The assessed value of the project upon which the Chapter 121A excise is based may include an assessment of personal property as well as real property, depending upon which of the methods of valuation provided for under Section 10 of the statute is used. However, we believe that the waiver of immunity form real property taxation in Section 208 would authorize the payment of the excise so long as the amount of the excise charged did not exceed the amount of real property taxes which would have been charged to the project but for the exemption provided under Chapter 121A. We express no opinion as to whether the amount of the excise actually assessed is proper; we leave it to the Area Office to determine whether there are grounds for appealing the amount of the excise.

Conclusion

Based on the analysis set forth above, it is our conclusion that the waiver of immunity from real property taxation set forth in Section 208 of the National Housing Act serves to waive HUD's immunity from the excise under Section 10 of Chapter 121A assessed after title to the property was acquired by HUD, and we request concurrence from your office. A memorandum on this issue from the Director, Office of Regional Housing, dated July 31, 1979 is attached for your reference. As stated earlier, it is our understanding that your office agrees with the analysis made in our May 14, 1979 memorandum regarding the relative priority of the project mortgage lien and the state excise lien for taxes assessed prior to foreclosure, but we would appreciate receiving formal concurrence from your office on that issue.

Marvin H. Lerman

Regional Counsel

Joseph F. Gelletich
Assistant General Counsel
for Low-Rent Housing

23 AUG 1979

John W. Kopecky

Omaha Lease-Purchase Program

In view of the attached letter from Congressman John Cavanaugh, dated August 7, 1979, it appears that the July 23, 1979, inquiry from Mr. Lou Anderson is primarily concerned with public housing matters. Therefore, the attached correspondence is being returned to you for appropriate response.

The following information about single family mortgage insurance programs will assist in the preparation of your reply. In accordance with Regulation 203.32, a mortgagor must establish that, after a mortgage has been recorded, the mortgaged property will be free and clear of all encumbrances other than the mortgage. This requirement precludes the insurance of mortgages under the arrangement described in Regulation 804.114. This result has been modified, however, by Section 323 of the 1978 Housing and Community Development Amendments. Under this new statutory provision, the Secretary may insure a mortgage on a dwelling unit that is also subject to a secondary lien held by a State or local governmental agency or instrumentality. The terms and conditions, which will be prerequisites to approval for mortgage insurance, were published in the Federal Register on August 9, 1979, at 44 F.R. 46886 (copy attached). When the final regulation is published, FHA mortgage insurance will become available to homebuyers who achieve ownership through the Turnkey III program.

/s/ John W. Kopecky

Associate General Counsel
for Insured Housing

4 SEP 1979

MEMORANDUM TO: Lawrence B. Simons, Assistant Secretary
for Housing, H

/s/ Edward W. Norton

FROM : Edward W. Norton, Acting General Counsel, G

SUBJECT : FHA's Obligations Under the Multifamily
Mortgage Insurance Contract

I. INTRODUCTION; QUESTIONS PRESENTED

This is in response to your oral request to Burt J. Deutsch to provide a legal opinion with respect to certain questions raised by Standard and Poor (S & P) at a meeting on June 14, 1979, and in their letter of June 19, 1979, to Michael Smilow.

These questions have been raised in connection with S & P's rating of 11(b) bonds. Since the proceeds from the sale of the bonds are used to fund FHA insured mortgage loans and the mortgage loans are security for the payment of the bonds, the rating of the bonds is dependent upon the certainty of repayments under the insured mortgages. Since the mortgages are insured under the National Housing Act, S & P wants to know the reliability of the insurance and the U.S. guaranty of payment.

The questions relate to FHA's ability to pay multifamily mortgage insurance claims in cash in the event of a shortage in either the General or Special Risk Insurance Fund and to the Government's obligations to redeem debentures issued in payment of multifamily claims. The specific questions are as follows:

(1) Must the Treasury lend money to FHA at FHA's request?

(2) Must the Treasury lend money upon demand or quarterly, semi-annually or annually?

(3) Is there a dollar limit on FHA's ability to borrow from the Treasury?

(4) Are debentures issued in payment of an insurance claim guaranteed as to payment by the United States?

(5) Once a claiming mortgagee has met all of the prerequisites for payment, is there a contractual

or statutory time limit within which FHA must make the payment?

The first three questions relate to multifamily mortgage insurance claims payable in cash. The fourth question relates to multifamily insurance claims payable in debentures.

II. CASH PAYMENTS

Multifamily mortgage insurance claims are payable in cash with respect to mortgages insured under the following provisions of the National Housing Act: Sections 220, 221, 233 (endorsed on or after July 7, 1961), 235(j)(1), 236 and 241 (for loans made in connection with any of the foregoing sections and endorsed for insurance on or after July 15, 1978) and any other section of Title II or Title XI of the National Housing Act for mortgages endorsed pursuant to Section 223(e) of that Act.

Section 520(b) of the National Housing Act (12 U.S.C. §1735d(b)) states, in part, as follows:

> "The Secretary is authorized to borrow from the Treasury from time to time such amounts as the *Secretary shall determine* are necessary (1) to make payments in cash (in lieu of issuing debentures guaranteed by the United States, as provided in this Act) pursuant to the provisions of this section . . . ." (Emphasis added).

Under Section 520(b), the Secretary of Housing and Urban Development, and not the Treasury, determines the amount of funds to be borrowed and the time when such funds are advanced. In other words, the Treasury must lend such funds to HUD upon demand by the Secretary. Borrowed funds are repaid with appropriated funds, but HUD's right to borrow from the Treasury is not dependent upon, nor can it be impaired by, the amount of funds actually appropriated or the failure of the Congress to make such appropriations. Thus, there is no dollar limit on HUD's authority to borrow funds from the Treasury to pay mortgage insurance claims in cash.

III. DEBENTURE PAYMENTS

Multifamily mortgage insurance claims are payable in debentures with respect to mortgages insured under the following provisions of the National Housing Act: Sections 207, 213, 234(d), 231, 232, 241 and 242 and Titles X and XI of the National Housing Act. With respect to these claims, Section 207(i) of the National Housing Act (12 U.S.C. §1713(i)) states, in part, as follows:

> "They [debentures] shall be paid out of the General Insurance Fund which shall be primarily liable therefor and they shall be fully and unconditionally guaranteed as to principal and interest by the United States, and such guaranty shall be expressed on the face of the debentures. In the event the General Insurance Fund fails to pay upon demand, when due, the principal of or interest on any debentures so guaranteed, the Secretary of the Treasury shall pay to the holders the amount thereof which is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated . . . ."

The Attorney General of the United States has rendered several opinions with respect to whether statutory language similar to that quoted above creates an enforceable guaranty of the United States. In opinions to the Secretary of the Treasury at 38 Op. Att'y Gen. 75, 76-77 (1934) and 38 Op. Att'y Gen. 319, 321 (1935) concerning the guaranty provisions contained in the Home Owners' Loan Act, the Federal Farm Mortgage Corporation Act, and Section 204 of the National Housing Act, the Attorney General stated the following:

> "The guaranty of principal and interest is a guaranty of payment. [Citation omitted.] . . . [I]f the guaranty is 'unconditional' the obligation of the guarantor arises immediately upon failure of the debtor to pay according to the terms. [Citation omitted.]
>
> " . . . The separable provision that the Secretary of the Treasury shall pay if the corporation is unable to pay upon demand is no part of the guaranty, but merely a provision for carrying it out in the only reasonably conceivable contingency that would require such action."

In the latter opinion dealing with Section 204 of the National Housing Act, the Attorney General concluded as follows:

> "[I]f the Federal Housing Administrator should fail, upon demand by a bona fide and accredited holder, to pay either principal or interest when due, the United States would thereupon become obligated to make such payments and its obligation would not be conditioned upon the institution of any proceeding by the holder against the Administrator or against the fund set up as provided in the statute." Id. at 322.

In a much later opinion concerning guarantees of government agency obligations, the Attorney General stated, at 42 Op. Att'y Gen. 305, 308 (1965), the following:

> "A series of opinions of the Attorney General . . . has established that a guaranty by a Government agency contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging its 'faith' or 'credit' to the redempton of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption."

The Department of the Treasury has published regulations (31 C.F.R. Part 337) covering the redemption of FHA debentures. In short, these regulations provide that the Treasury is the agent of the FHA for transactions in debentures which have been, or may be, issued pursuant to the National Housing Act, and that such transactions are governed by the general regulations of the Treasury governing U. S. bonds and notes (31 C.F.R Part 306) as well as the supplementing rules and regulations in Part 337. Among other things, Part 337 provides that redemption of called or maturing debentures is made by delivery of the debentures to a Federal Reserve Bank or to the Bureau of the Public Debt. FHA/HUD, as such, has no actual involvement in the redemption process.

In my opinion, based upon the statute and the opinions of the Attorney General, the debentures issued in payment of a multifamily insurance claim are guaranteed by the United States as to the payment of principal and interest.

IV. TIME LIMIT FOR PAYMENT

Neither the National Housing Act nor the regulations thereunder impose any time limit on HUD in effecting payment of a multifamily mortgage insurance claim. We think that the law would imply a reasonable time to effect such payment. This issue has never been litigated with respect to FHA insurance claims. The Court of Claims has held, however, that late payment on a Government contract is not a material breach when the delay is reasonable in the light of all circumstances, i.e., time required to prepare all the paperwork and secure necessary certifications and approvals, and that there is a clear distinction between a mere delay in payment and a total failure to pay over many months. *Northern Helex Co.* v. *U.S.*, 197 Ct. Cl. 118 (1972); *Overstreet* v. *U.S.*, 55 Ct. Cl. 154 (1920).

I understand that your office is gathering data on how much time HUD has taken to make payments of multifamily mortgage insurance claims. The initial findings show that, during the past year, partial payments have been made within three days after the dates of the assignments of the mortgages or conveyances of the properties to the Secretary, and final payments, which cannot be made until the mortgagees have satisfied certain additional requirements, have been made within an average of ninety days after such assignments or conveyances. These findings indicate that the time of payment by HUD has not been a significant problem in the past.

12 OCT 1979

MEMORANDUM FOR: Lawrence B. Simons
Assistant Secretary for Housing-
Federal Housing Commissioner

SUBJECT : Availability of Insured Financing in Areas
Adversely Affected by Indian Claims

This is in response to your request of July 3, 1979, for an opinion regarding your authority to insure home mortgages, and to accept titles on payment of home mortgage insurance claims, where the title is clouded by the claims of Indian tribes.

Section 204(a) of the National Housing Act gives you authority to accept title "which meets the requirements of rules and regulations of the Secretary in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations." This broad authority is restricted by Section 201(a) which requires that the mortgage be the type of lien which is "commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located."

Your memorandum to Jane McGrew dated July 3, 1979, states that in those states where Non-Intercourse Act claims are being filed "(s)ales of homes and other land transactions have been brought to a virtual halt because of the cloud that has been placed on titles to the land within the claims areas. Mortgage loans have become virtually impossible to obtain because of fears of lenders that any loan they make may not be secured by a valid first lien on the mortgaged property."

This finding clearly demonstrates that a title clouded by an Indian claim is not commonly given to secure advances on, or the unpaid purchase price of, real estate in these areas. The insurance of mortgages where the cloud on title has such broad effect is prohibited by Section 201(a) of the National Housing Act.

In the home mortgage programs, the question of eligibility does not arise at the time of insurance because HUD does not examine the condition of title before the mortgage is insured. Title examination occurs only if there is a claim for insurance benefits. The effect is the same because mortgagees want to be assured before loan closing that the title will be acceptable to HUD if there should be a default. The regulations require that on application for insurance benefits the mortgagee must convey good marketable title to HUD (12 CFR 203.366). Title is considered good and marketable if it is such as to be acceptable to prudent lending institutions and leading attorneys generally in the community in which the property is situated. (12 CFR 203.387). HUD determines the condition of title by examination of an owner's title policy, a mortgagee's policy, an abstract and legal opinion or other specific types of title evidence which the mortgagee must submit at the time of application for insurance benefits. The title evidence must cover the recordation of the deed to HUD.

In communities where title insurers do not except Indian claims from their coverage, HUD would accept the title to lands clouded by Indian claims, because prudent lending institutions and attorneys are likely to accept such titles. It may be possible that prudent lending institutions and attorneys would consider a title acceptable in conventional transactions notwithstanding an Indian claim exception, but the existence of the exception is strong evidence to the contrary.

(Signed) S. Leigh Curry, Jr.

S. Leigh Curry, Jr.
Acting Deputy General Counsel

31 OCT 1979

MEMORANDUM TO: Lawrence B. Simons, Assistant Secretary
for Housing, H

(Signed) S. Leigh Curry, Jr.
FROM: S. Leigh Curry, Jr., Acting Deputy General Counsel, GD

SUBJECT: Inclusion of Waste Provision in 24 CFR 207

I. INTRODUCTION

This is in reply to your memorandum of September 7, 1979, concerning the Inspector General's recommendation that Part 207 of the regulations be amended to require an insured mortgagee to protect and preserve the mortgage security. Specifically, the Inspector General recommended that (1) mortgagees be required to protect and preserve projects during construction as soon as the necessity for doing so arises; (2) mortgagees be reimbursed by HUD for reasonable expenses incurred in preserving the property regardless of whether or not a claim for insurance benefits is subsequently filed; and (3) appropriate deductions in insurance benefits be made if the property is damaged or destroyed as a result of the mortgagee's failure to take reasonable action to preserve the property.

II. RECOMMENDATIONS (1) AND (3)

In my opinion, there is no statutory impediment to HUD's amending 24 CFR §207.260 to implement recommendations (1) and (3) of the Inspector General. HUD has such authority under Section 211 of the National Housing Act and Section 7(d) of the Department of Housing and Urban Development Act.

For your information, prior to 1959, 24 CFR §207.250 imposed on a mortgagee the duty of preventing deterioration to the property after completion of construction, and prescribed a reduction in insurance benefits for any loss resulting from the mortgagee's failure to do so. A 1959 amendment deleted the paragraph prescribing a reduction in insurance benefits and added paragraph (b) which states, 'The mortgagee shall not be held responsible for such damage and deductions therefor will not be made from mortgage insurance benefits." This amendment was made because one of the high priority goals of the Department in that period was the insurance of many mortgages on properties located in the inner city and there was a reluctance by mortgagees to make loans in such areas until the present paragraph (b) was promulgated.

Section 207.499 of the regulations provides that the Commissioner may amend the regulations from time to time. However, this section also provides that any such amendment shall not adversely affect the interest of an insured mortgagee or of a mortgagee on a loan for which the Commissioner has issued a commitment to insure. In view of this regulation, an amendment to Section 207.250 implementing recommendations (1) and (3) of the Inspector General could be applied only to loans for which a commitment to insure was issued after the effective date of the amendment.

The amendment would not require any revisions to the loan documents since the building loan agreement and most of HUD's mortgage forms give the lender the right to inspect the premises. Both instruments also give the lender the right to take possession of the property in the event of the mortgagor's default.

III. RECOMMENDATION (2)

The Inspector General also recommends that the Department reimburse a mortgagee for reasonable expenses in preserving the property regardless of whether a mortgage insurance claim is filed. This recommendation cannot be effected under existing statutory authority. The basic statutory authority for the payment of claims is set forth in Section 207(g) of the National Housing Act. Under this section, in order for the Secretary to pay a mortgagee anything, there must be a default by the mortgagor and the mortgagee must assign the mortgage to HUD or acquire title to the project through foreclosure or by deed in lieu of foreclosure and convey such title to HUD. Under this section, in the absence of either assignment of the mortgage or conveyance of title to HUD, HUD has no authority to reimburse a mortgagee for preservation and protection costs.

However, from a practical standpoint, there appears to be no need for HUD to have such authority in order to induce a mortgagee to expend funds for completing or preserving the property. If a mortgage insurance claim is filed, completion and preservation costs may be included in insurance benefits pursuant to 24 CFR §207.259(b)(1)(ii). If a claim is not filed, presumably the mortgage would not be in default. In such case, the mortgagee could recover such costs by adding the amount thereof to the principal amount of the mortgage. In any event, it is unlikely that a situation would arise where the mortgagee would have to expend funds for completion or preservation and the mortgagee would be unable to file an insurance claim because the mortgage was not in default.

It is true that Section 203(e) of the Housing and Community Development Amendments of 1978 authorizes the Secretary to make a partial insurance payment to a mortgagee without requiring the mortgagee to either assign the mortgage or convey title to the property to HUD. However, this section also requires that the mortgage be in default before the mortgagee would be eligible for partial insurance benefits.

In summary, there is no statutory authority for the Secretary to reimburse a mortgagee for preservation and protection costs in the absence of the filing of a mortgage insurance claim by the mortgagee due to the mortgagor's default under the insured mortgage. Therefore, recommendation (2) of the Inspector General cannot be implemented without a legislative amendment.

28 NOV 1979

MEMORANDUM TO: Lawrence B. Simons, Assistant Secretary
for Housing, H

FROM: Jane McGrew
SIGNED

SUBJECT: Extending Waiver of One Percent Deduction from Insurance Benefits for Mortgages Financed with 11(b) Obligations

QUESTIONS PRESENTED

This is in response to your memorandum dated September 6, 1979, in which you asked for a legal opinion as to whether it would be permissible to extend further the exemption from the one percent deduction from insurance benefits for mortgages financed with funds from 11(b) obligations. As you stated, the present exemption for insurance benefits relative to such mortgages, which is set forth in 24 CFR §221.762(c), is limited to projects insured pursuant to Section 221 of the National Housing Act. Now you are being requested to extend this exemption to projects insured under other sections of the National Housing Act in cases where the funds for the mortgage loan are provided by 11(b) obligations. You have also asked for us to list the other sections of the Act to which this exemption may be extended.

STATUTORY PROVISIONS NOT REQUIRING THE ONE PERCENT DEDUCTION

As we have indicated previously in connection with the exemption set forth in 24 CFR §221.762(c), Section 221 of the National Housing Act provides express statutory authority for the payment of the full amount of the unpaid principal balance in insurance benefits without the customary one percent deduction. Section 221(g)(2) of the Act incorporates Section 207(g) by reference. Section 207(g) provides that an amount equivalent to one percent of the unpaid amount of such principal obligation is to be subtracted from the total face value of debentures issued in payment of a mortgage insurance claim. However, Section 221(g)(3) authorizes payment of the full amount of the unpaid principal balance without the one percent deduction.

In addition, Sections 220(f)(3) and 233(f) and Section 238(a)(3), which governs the payment of insurance benefits on Section 236 loans and Section 235(j) loans, contain language similar to Section 221(g)(3), which would authorize payment of the full amount of the unpaid principal without the one percent deduction. In spite of this broad statutory authority for the Section 236 and Section 235(j) programs, the present regulations for those two programs authorize the waiver of the customary one percent deduction only in cases where HUD requests the assignment and the mortgage is not in default. 24 CFR §§235.715(c) and 236.265(c). There has been no implementation of this statutory authority for the Section 220 and 233 programs.

The regulations for loans insured under all of these programs could be amended to extend the exemption from the one percent deduction from insurance benefits to mortgages insured under those sections which are financed with funds from 11(b) obligations.

SECTION 523 WAIVER PROVISION

The only other statutory authority for payment of the full amount of the unpaid principal balance without the customary one percent deduction is set forth in Title V of the National Housing Act in Section 523, which was added by Section 312 of the Demonstration Cities and Metropolitan Development Act of 1966. This short, one paragraph section provides as follows:

> "Notwithstanding any other provision of this Act, . . . the Secretary, under such terms and conditions as he may approve, may waive all or a part of the 1 per centum deduction otherwise made from insurance benefits with respect to multifamily housing or land development mortgages assigned to him, where the assignment is made at his request in lieu of foreclosure of the mortgage."

The language of this section is very broad, authorizing the Secretary to establish the terms and conditions for the exercise of this waiver. The only apparent statutory prerequisite or condition for the exercise of the waiver authority is contained in the last clause -- that the assignment be made at the Secretary's request in lieu of foreclosure of the mortgage.

A review of the reports of the House and Senate Committees on Banking and Currency reveals statements relative to the purpose for the enactment of Section 523. See H.R. Rep. No. 1699, 89th Congress, 2d Session 30, 31 (1966), H.R. Rep. No. 1931, 89th Congress, 2d Session 24 (1966) and S. Rep. No. 1455, 89th Congress, 2d Session 5 (1966). (Copies attached.)

The committee reports indicate that Congress desired to help mortgagors of FHA multifamily housing projects who, in spite of good management, were in default on the mortgages. Congress was concerned that insured mortgagees would elect to foreclose and convey title to the property to HUD in order to avoid the statutorily required one percent deduction from insurance benefits in connection with an assignment of the mortgage to HUD. Foreclosure would, of course, wipe out the interest of the mortgagor in the property. Congress felt that this was not always in the best interest of the government, since foreclosure could endanger the success of projects where owners were providing good management and were making progress in efforts to bring the mortgage current.

According to the statements in these reports, Section 523 was enacted in order to give HUD the power, by waiving the one percent deduction from insurance benefits, to induce mortgagees to assign the mortgage rather than foreclose. By avoiding foreclosure and taking an assignment of the mortgage, HUD, as the mortgagee, could permit the mortgagor to continue operating the project and would have more flexibility than a private mortgagee in effecting a workout arrangement to cure the default under the mortgage.

The regulatory implementation of this statutory authority is set forth in 24 CFR §207.259(b)(2)(iv):

> ". . . except that all or part of the 1 percent may be waived by the Commissioner if, at his request and in lieu of foreclosure, the mortgage is assigned to the Secretary."

The question arises whether Section 523 would authorize a waiver of the one percent deduction from insurance benefits for all mortgages financed with funds from 11(b) obligations. Obviously, this type of waiver does not fall within the purpose contemplated in the committee reports. In addition, it is clear from reviewing Section 523 in the light of the committee reports that the waiver of the one percent deduction was to be a means to encourage the desired end of preventing foreclosure by the mortgagee so that HUD could work with the mortgagor.

In contrast, the waiver of the one percent deduction for 11(b) transactions is itself the end sought by the artificial means of requesting the assignment in order to satisfy the express statutory condition. Apparently, it is felt by proponents that the waiver of the one percent deduction will result in better marketing terms for the 11(b) obligations.

Conclusion

In view of the foregoing, it is my opinion that the waiver of the one percent deduction in insurance benefits for mortgages financed with funds from 11(b) obligations would not be appropriate under the provisions of Section 523. The Secretary has the present statutory authority to promulgate regulations to waive the one percent deduction from insurance benefits for multifamily mortgages financed with 11(b) obligations for the following programs only: Section 221, Section 220, Section 236, Section 235(j)(1) and any project mortgages insured under Section 233 pursuant to the requirements of some other section of the National Housing Act.

Attachments

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

DEC 11 1979

MEMORANDUM TO: Lawrence B. Simons
Assistant Secretary for Housing-
Federal Housing Commissioner

FROM : Jane McGrew Jane McGrew

SUBJECT : Texas Usury Law

This memorandum responds to your request for an opinion about the applicability of the Texas usury law to mortgages insured under Titles I and II of the National Housing Act.

Your request refers to an inquiry from the National Association of Home Builders (NAHB) on this question. The NAHB letter of October 30, 1979, asks for an interpretation of the applicability of 12 U.S.C. §1709-1 to the usury statutes of the State of Texas. That provision, originally enacted as Section 8 of the Veterans Housing Amendments Act of 1976, provides a limited federal exemption from state usury laws. The language of Section 8 indicates that the federal exemption was intended to preempt state constitutional provisions which limited interest rates chargeable by certain classes of lenders. At the time of its enactment, Section 8 was applicable only to a situation that existed in the State of California.

Article 16, Section 11 of the Texas State Constitution, which sets a usury rate applicable in the absence of legislation fixing maximum rates of interest, does not distinguish between classes of lenders. The federal exemption contained in 12 U.S.C. §1709-1 does not, therefore, apply to the usury limitations in Texas.

You may wish to inform the NAHB that an exemption from state usury laws is now pending before Congress as part of the Housing and Community Development Amendments of 1979. Unlike Section 8 of the 1976 Veterans Act, this exemption would apply to any state constitution or statute concerning usury, whether or not there are distinctions between classes of lenders. If enacted, this federal exemption would preempt the Texas usury limitations. The NAHB should be cautioned, however, that the proposed legislation would permit a state to override the federal exemption by enacting a state usury limitation subsequent to the effective date of the 1979 Housing Amendments Act.

At the present time, no Federal statute precludes Texas laws limiting interest rates from applying to FHA-insured mortgages. Under Article 5069-1.09, Vernon's Texas Civil Statutes, which contains the Texas ceiling on interest rates for FHA-insured mortgages, the maximum rate is determined by reference to the rate of interest permitted by HUD under regulations issued pursuant to the National Housing Act. We understand, however, that a controversy has developed over the validity of Article 5069-1.09 under the Texas State Constitution. Article 16, Section 11 of the state constitution requires the Texas Legislature to define the maximum rate of interest. Since the maximum interest rate for FHA-insured mortgages (currently 11.5%) reflects a rate established by HUD rather than the Texas Legislature, a title attorney in Texas has orally advised us of his opinion that Article 5069-1.09 violates the technical requirements of the Texas Constitution. If Article 5069-1.09 were unconstitutional, the interest rate for FHA-insured mortgages would be governed by the ceiling set forth in Article 5069-1.07. The latter rate was 11.25% for the month of November; consequently, an FHA-insured mortgage with an interest rate of 11.5% could be usurious under Texas law. Although we cannot give an opinion on the constitutionality of Article 5069-1.09 under the Texas Constitution, we think that you should be aware of the problem.

THE GENERAL COUNSEL OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

DEC 21 1979

MEMORANDUM TO: Lawrence B. Simons, Assistant Secretary
for Housing, H

FROM: Jane McGrew Jane McGrew

SUBJECT: National Energy Conservation Policy Act Amendments to Section 241 of the National Housing Act

INTRODUCTION; QUESTIONS PRESENTED

This is in response to your memorandum of July 18, 1979, in which you presented questions concerning the correct interpretation of two provisions of the amendments to Section 241 of the National Housing Act contained in Section 247 of the National Energy Conservation Policy Act (NECPA), Public Law 95-619. Members of my staff have been in contact with your staff on these issues. Essentially, your questions concerning the NECPA amendments are as follows:

1. Do the provisions of Section 241(e)(2)(A) of the National Housing Act relating to energy conserving improvements or a solar energy system mean that, in addition to the actual amounts necessary for the purchase and installation of such improvements or such a system, the insured loan may also include an undefined amount related to estimated savings in the future resulting from the operation of such improvements or system?

2. Does Section 241(e)(2)(B) create a coinsurance program for energy improvements by limiting the Department's insurance benefits to 90% of the loss incurred by the lender?

In addition to these two questions of interpretation, you ask our advice as to whether a technical amendment is in order to allow the Department to implement these provisions effectively.

AMOUNTS INCLUDABLE IN THE INSURED LOAN

Your concern is that the implication of the new Section 241(e)(2)(A) is that an insured loan for the installation of energy conserving improvements or a solar energy system could include monies in excess of that necessary for the purchase and installation of such improvements or such a system if those additional amounts could be supported by estimated savings resulting from the operation of the improvements or system. The basis for this inference is the provision in that new section that the maximum amount for such a loan may not exceed an amount which the Secretary deems appropriate taking into account amounts which will be saved in operation costs as a result of the improvements or system.

In our opinion, the amendments as a whole do not support that interpretation. The provisions of Section 241(e)(1) make it clear that the purpose of the insured loan is the "purchasing and installing" of these energy conserving improvements or solar energy system. A loan for an amount in excess of that necessary for "purchasing and installing" such improvements or such a system would fall outside the statutory purpose as enunciated in that section. Therefore, it is our opinion that a loan would not be eligible for insurance under this section if the loan exceeded the amount necessary for the purchasing and installing of the appropriate improvements or system.

Moreover, this interpretation is supported by the legislative history of the NECPA amendments to Section 241. The legislative history indicates that the language of Section 241 appeared earlier in the proposed National Weatherization Act of 1977, H.R. 7893. The Report accompanying the proposed H.R. 7893 at page 32 indicates the intent of the Committee and states as follows:

> "Loans eligible for insurance may not exceed an amount the Secretary determines necessary to purchase and install individual utility meters plus an amount determined appropriate (considering the operating costs saved over the period of repayment of the loan by reducing the project's energy requirements) for the installation of energy-conserving improvements." (Emphasis added.)

This statement indicates that the "plus an amount determined appropriate" was to be restricted to the cost of "installation of energy-conserving improvements," and does not extend to "up front cash not necessary for, nor used in connection with, expenses related to installation of energy saving devices" as your memorandum suggests.

Thus, the maximum amount of an insured loan would be the cost of purchase and installation even if the estimated savings exceeded that cost. If the amount of the estimated savings were less than the cost of purchase and installation, the insured loan could still conceivably include the full cost of purchase and installation or be limited to only a portion of the full cost, depending upon the Secretary's determination of what amount would be appropriate taking into account the amount of future savings.

COINSURANCE PROGRAM

The Committee Report accompanying the proposed National Weatherization Act of 1977 also is helpful in determining the answer to the second question posed. The Report at page 13 states in part as follows:

> "This program established under Section 241 of the National Housing Act, would permit HUD to coinsure loans for weatherization improvements and the conversion of master electrical meters to single electric meters, in both FHA and conventionally financed multifamily projects." (Emphasis added.)

At page 32, the Report further states,

> "The loans would be insured for 90 percent of any loss except that 100 percent of any loss would be insured for cooperative multifamily projects assisted under section 236 or financed with a below market interest rate mortgage insured under section 221(d)(3)."

Therefore, it is our opinion, based upon the statutory language and the Committee Report, that Section 241(e)(2)(B) creates a coinsurance program for 90% of the loss incurred by the lender, rather than an insurance program limiting the insured energy improvement loan to 90% of value. Of course, insofar as cooperatives financed under Sections 236 or 221(d)(3) BMIR are concerned, no coinsurance would be involved because the Secretary may insure 100% of any loss.

AMENDMENT OF SECTION 241

In light of the foregoing, if you still believe that the 90% coinsurance provision or any other provision of Section 241 would either make Section 241 impossible to implement or unworkable, then you should initiate an appropriate change to the legislation. The offices of the Associate General Counsel for Insured Housing and Associate General Counsel for Legislation will be happy to provide any advice and assistance that you might need.

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